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No.

IN THE

Supreme Court of the United States

October Term, 1981

BRUCE KING, Governor of the State of New Mexico and SHIRLEY HOOPER, Secretary of State of the State of New Mexico,

Appellants,

v.

FRANK I. SANCHEZ, *et al.*, RAYMOND VARGAS, *et al.*, D. H. "CHILI" YAZZIE, *et al.*, RONALD G. OLGUIN, *et al.*, and PATRICIA M. MARSH,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the district court erred in holding that state legislative apportionment must be based exclusively on raw population census figures.

LIST OF PARTIES TO THE PROCEEDING

The initial action, *Sanchez* v. *King*, Civ. No. 82-0067-M was filed against Appellants Bruce King and Shirley Hooper. The plaintiffs in that action were: Frank I. Sanchez, Antonio Carrasco, Marcelino Polano, Edward Martinez, Yolanda Hermosillo, Patricia Manus, Robert Yazzie, Lorenzo Garcia, Lorenzo R. Sanchez, Merle Garcia, Jose F. Romero, Frank A. Jojola, Joe Madalena, Harry Early, Joseph Ansera, George Montoya, Clyde Leon, Mercel Bird, Benny Salas, Gilbert Pena, Gerald Nailor, Thelma Talachy, Joseph Calabaza, Lupe Duran, Donald Cata, Paul Tafoya, and Tony Reyna. Subsequently five other lawsuits were filed and consolidated with *Sanchez*. Those actions and the party plaintiffs involved were as follows: *Vargas* v. *Hooper*, Civil No. 82-0846 (Plaintiffs Ray M. Vargas, Al Valdez and the New Mexico Civil Liberties Union); *Yazzie* v. *Hooper*, Civil No. 82-0180C1 (Plaintiffs D. H. "Chili" Yazzie, Sol Ondelacy and Lavern Pinnecoose); *Olguin* v. *Hooper*, Civil No. 82-219JB (Plaintiffs Ronald G. Olguin and Marlie Olguin)*; *Marsh* v. *King*, Civil No. 82-0246JB (Plaintiff Patricia Marsh). In addition the United States was granted leave to intervene as a party plaintiff.**

Appellants King and Hooper were named as defendants in each of the actions mentioned above. C. Gene Samberson, Speaker of the House of Representatives of New Mexico, and Roberto Mondragon, Lieutenant Governor of New Mexico and President of the Senate, although initially named as defendants, were subsequently dismissed as improper parties.

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*This action, although originally filed in state court, was removed to federal court and then consolidated herein.

**Other party plaintiffs intervened in the proceedings below to challenge two collateral orders by the lower court. Those parties (Bingaman, *et al.*) brought their challenge to this Court by way of an earlier application for stay, *Bingaman* v. *King*, 50 U.S.L.W. 3857 (U.S. April 23, 1982), but that matter is unrelated to this appeal on the merits. Appellants have not listed the parties in that matter because their stated interest in the proceedings went only to the collateral orders which are not relevant to this appeal.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the United States District Court for the District of New Mexico relevant to this appeal are unreported. They are reproduced in full in Appendices A and B, *infra*.

JURISDICTION

Governor Bruce King and Secretary of State Shirley Hooper appeal from the declaratory and injunctive relief afforded below: the district court's injunction and subsequent order declaring New Mexico's Reapportionment Acts unconstitutional, which together combined to halt the scheduled elections for the

New Mexico House of Representatives and Senate under the 1982 Reapportionment Acts. Jurisdiction was conferred on the district court by 28 U.S.C. §§ 1331, 1343(3) and 2284.

The injunction appealed from was issued on April 5, 1982 and the declaratory judgment was issued by way of a Memorandum Opinion and Order entered on April 8, 1982. The Notice of Appeal was filed in the United States District Court for the District of New Mexico on April 29, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1253. *See Chapman* v. *Meier*, 420 U.S. 1, 13-14 (1975); *White* v *Regester*, 412 U.S. 755, 759-61 (1973); *Mahan* v. *Howell*, 410 U.S. 315, 318 (1973); *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187, 194-95 (1972).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The fourteenth amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant portions of the 1982 New Mexico Reapportionment Acts are reprinted in Appendices D & E, *infra*. The pertinent provisions for purposes of this appeal are §§ 1 (Findings), 5 (Precincts) and 6 (Precinct populations) of each Act.

STATEMENT OF THE CASE

At issue in this case is an effort by the State of New Mexico to achieve equality of voting power among its citizens despite substantial concentrations of transients, aliens and other ineligible residents within its total population. In *Burns* v. *Richardson*, 384 U.S. 73 (1966), this Court approved a similar effort

by the State of Hawaii, concluding that states were not required to count aliens, transients, temporary students or convicts in its population base for reapportionment purposes. The district court below, however, turned its back on this Court's past pronouncements in holding that census population equality is the only constitutionally permissible basis for apportionment.

As the evidence introduced in the district court demonstrated, the characteristics and distribution patterns of New Mexico's population would produce wide variations in the voting power of individual voters if apportionment were based solely upon census population. For example, Kirtland Air Force Base is located principally in Precincts 286 and 292. Of 13,129 persons in the census count for those precincts, only 1753, or 13%, voted in the 1980 election. Similarly, in Precinct 215 in Bernalillo County, whose census population total of 2066 is swollen by the presence of students at the State University[1]—many of whom are ineligible to vote or vote elsewhere—the number of votes cast in the 1980 election amounted to only 11.2% of the census population.

This divergence between population distribution and voter distribution occurs throughout the State, with voter-population ratios varying from very low to very high. The pattern is not surprising inasmuch as New Mexico is a thinly-populated state (1980 population 1,299,000) situated on the Mexican border. Its residents include a number of census-counted aliens who are ineligible to vote. Furthermore, New Mexico contains several large transient population concentrations, *e.g.*, the State Penitentiary (Santa Fe County), and government or military installations at Holloman A.F.B. (Otero County), Cannon A.F.B. (Curry County) and Las Vegas State Hospital (San Miguel County), whose residents either cannot vote or else vote in other places. Given these unique circumstances, use of a strict population approach to apportion legislative districts would enhance the voting power of individuals who fortuitously live in areas with an unusually large

[1] The University, with a total enrollment of over 14,000, covers a number of precincts, including No. 215.

concentration of transients or otherwise ineligible residents.

In an effort to remedy this potential deviation from the one-man, one-vote principle, the State of New Mexico adopted the 1982 House Reapportionment Act, and the 1982 Senate Reapportionment Act. 1982 N.M. Laws, Special Session, Ch. 1 (House Reapportionment Act) and Ch. 2 (Senate Reapportionment Act.) These Acts provided for a seventy member House of Representatives and a forty-two member Senate, with the membership of both houses to be elected from single member districts. The basic administrative units for the conduct of elections in New Mexico are the election precincts, which are combined to form the electoral districts. Because the United States Census Bureau does not provide detailed data from which the eligible voter population in each precinct can be determined, the Acts utilize a "derived precinct population" based on the following formula:

$$\frac{\text{County Population According to the 1980 Census}}{\text{Total Votes Cast in County in the Last General Election}} \times \text{Total Votes Cast In the Precinct In the Last General Election} = \text{Derived Precinct Population}$$

Id. at Section 6.

Under the formula, the total population for each county will be equal to that determined by the Census Bureau. *See Id.* at §6(B). In counties in which ineligibles are concentrated in certain precincts, however, the effect of the formula is to distribute the ineligibles over the entire county, thereby ensuring the equality of voting power of citizens within the various precincts. Using the derived precinct populations results in legislative districts that vary only slightly from the derived population norms, with House districts ranging from +4.73% to -4.94%, and Senate districts ranging from +4.86% to -4.98%.

On January 22, 1982 the initial suit was filed challenging the constitutionality of the formula as a means of reapportionment. Five other suits followed.[3] A three-judge court was

[3]In addition to the malapportionment claim against the formula, some plaintiffs claimed that the State reapportionment plans were

convened pursuant to 28 U.S.C. § 2284, and that court ordered all of the lawsuits consolidated with the initial action of *Sanchez* v. *King*. The three-judge court bifurcated the issues for trial and asked the parties to address only the fourteenth amendment malapportionment claim.

On April 5, 1982, after a four day evidentiary hearing preceded by substantial briefing and followed by submissions of extensive proposed findings and conclusions, the court below entered a preliminary injunction enjoining "indefinitely" the filing deadline for legislative candidates wishing to stand for election in the June 1, 1982 primary. *See* Appendix A, *infra*. On April 8, 1982, the three-judge panel entered a Memorandum Opinion and Order declaring unconstitutional the 1982 Reapportionment Acts, holding that the " 'votes-cast formula' . . . leads to a result which is constitutionally impermissible," because it fails to assure the construction of "legislative districts on the basis of actual population." *See* Appendix B, *infra*.[3] The district court did not fault New Mexico's showing at the evidentiary hearing that the State's population make-up would produce significant disparities in individual voting power if a straight population approach were utilized, nor did it find that use of the legislative formula would misallocate the voting power of eligible citizens. Rather, the district court simply

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racially discriminatory. Initially, they claimed that the State plans intentionally diluted minority voting strength thereby depriving them of the opportunity to elect candidates of their choice to the New Mexico State Legislature. They also claimed that the formula had the effect of discriminating against Indians and Hispanics because those groups have traditionally had a lower voter turnout rate than the general population. The *Olguin* case, which was one of the five cases consolidated below with *Sanchez*, also raised a state law claim with respect to carry-over terms for some senators, but that issue, as well as the purposeful discrimination claims were mooted by the lower court's resolution of the malapportionment claim.

[3] Subsequently, Appellants asked the lower court to stay its ruling, or in the alternative, put off the June 1st primary in its entirety so that the State could make provisions for one integrated primary later in the summer. The lower court granted the latter request, but that order was overturned by this Court's stay in *Binguman* v. *King*, 50 U.S.L.W. 3857 (U.S. April 23, 1982).

disregarded these factors and applied a rigid "population-only" test.

Since that time, the June 1, 1982 non-legislative primary has taken place and the State is complying, as it must, with the lower court's substantive orders. Appellants seek plenary review of those orders, however, because the issues are of great importance to the State of New Mexico in planning for future elections.

THE QUESTION PRESENTED IS SUBSTANTIAL

I. THE *PER SE* REJECTION OF EFFORTS TO AMELIORATE THE EFFECTS OF INELIGIBLE RESIDENTS ON THE POPULATION BASE WILL FRUSTRATE THE LEGITIMATE REAPPORTIONMENT GOALS OF NEW MEXICO AS WELL AS OTHER SIMILARLY SITUATED STATES.

This is not a traditional numerical deviation reapportionment case. At issue is the method of deriving the relevant population, not, as in most reapportionment cases, the permissible range of deviation from the agreed upon relevant population base. Indeed, if the State's method of deriving the relevant population at the precinct level is constitutionally permissible, then clearly the numerical deviations among legislature districts under the 1982 New Mexico Reapportionment Acts are *de minimis*, since in no case is the deviation in excess of 5%, thus establishing the constitutional validity of the acts themselves.

The district court's *per se* rejection of New Mexico's apportionment formula requires this Court's close attention. The ruling that a state is only permitted to apportion on the basis of raw population has far-reaching and adverse implications for New Mexico, as well as having ominous implications for all other states facing similar problems.

As far as New Mexico's particular interests are concerned, the demographic factors which led the State to adopt this approach are, for all practical purposes, permanent. There is no reason to believe that distortions produced by transient population concentrations or the presence of illegal aliens will just go away. Consequently, the district court's decision

effectively condemns the State to a future in which the discrimination and inequity which flow from the application of a population–only approach in New Mexico will become permanently institutionalized.

The same is true for other states confronted with the problems arising from scattered population patterns and pockets of ineligibles. The district court's ruling will handcuff these states if they attempt to bring their apportionment schemes closer to the one-man, one-vote ideal by deviating from a rigid, population-only approach.

The critical issue, then, both for New Mexico and for other similarly situated states is not only that the district court's ruling applied an unduly-strict standard, but also that it imposed a standard that will frustrate constructive efforts to cope with demographic factors in the apportionment effort. Because adoption of such a rigid rule undermines the one-man, one-vote principle, there is an urgent need for review of the district court's decision by this Court.

II. EXCLUSIVE USE OF RAW CENSUS DATA WOULD RESULT IN A DISTORTED DISTRIBUTION OF THE RELEVANT POPULATION WHICH NEW MEXICO HAS PERMISSIBLY CHOSEN AS THE BASIS FOR ITS REAPPORTIONMENT PLAN

A. Raw Population Data Is Not An Absolute Standard Against Which Legislative Districts Must Be Measured

From its inception in *Baker* v. *Carr*, 369 U.S. 186 (1962), the one-man, one-vote principle has aimed at preventing dilution of the individual citizen's right to exercise his or her political rights. This principle is intended, in the words of the Court, to ensure "that every voter is equal to every other voter in his State . . . ." *Gray* v. *Sanders*, 372 U.S. 368, 380 (1963). This Court has found the right to vote unconstitutionally impaired only "when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Gaffney* v. *Cummings*, 412 U.S. 735, 744 (1973), quoting *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964).

Total population data as provided by the U.S. Census Bureau includes within its "count" all residents of a given locale, and is not limited to voting-eligible citizens. *See Federation for American Immigration Reform* v. *Klutznick*, 486 F. Supp. 564, 576-77 (D.D.C.) (census count required to include illegal aliens), *appeal dismissed*, 447 U.S. 916 (1980). Consequently, exclusive reliance on raw population figures, including as they do ineligible residents, may bring about results which dilute some voters' rights in precisely the manner condemned by the one-man, one-vote principle. As this Court stated in *Burns* v. *Richardson*, 384 U.S. 73, 94-95 (1966):

> Total population figures may thus constitute a substantially distorted reflection of the distribution of state citizenry. If so, a finding that registered voters distribution does not approximate total population distribution is insufficient to establish constitutional deficiency. It is enough if it appears that the distribution of registered voters approximates distribution of state citizens or another permissible population base.

For this reason, this Court has made it clear "that the Equal Protection Clause does not require the states to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured." *Id.* at 91.

The district court erroneously concluded that the State must "construct legislative districts on the basis of actual population" to the exclusion of any other legitimate population basis (Appendix B at 4, *infra*), and that the only allowable deviations from census data are "for obvious errors which can always occur." (Appendix B at 3, *infra*,) This premise, upon which the entire lower court opinion rests, departs radically from this Court's decisions rejecting the idea of mechanical adherence to raw census approaches, betrays the one-man, one-vote principle and, in the case of New Mexico, produces unjustifiable anomalies and distortions in the election process.

In *Gaffney* v. *Cummings*, *supra*, this Court clearly rejected the notion that raw census data should ever rise to the level of

a constitutional imperative. In putting that notion to rest this Court recognized the deficiencies inherent in raw census data:

> [T]otal population, even if absolutely accurate as to each district when counted, is nevertheless not a talismanic measure of the weight of a person's vote under a later adopted reapportionment plan. The United States census is more of an event than a process. It measures population at only a single instant in time. District populations are constantly changing, often at different rates in either direction, up or down. Substantial differentials in population growth rates are striking and well-known phenomena. So too, *if it is the weight of a person's vote that matters, total population – even if stable and accurately taken – may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because "census persons" are not voters.* The proportion of the census population too young to vote or disqualified by alienage or nonresidence varies substantially among the States and among localities within the States.

412 U.S. at 746-47 (emphasis supplied). The Court in *Gaffney* did not stop at rejecting the claim that a raw census standard is constitutionally mandated but went on to point out that such an approach carries with it a serious threat to the one-man, one-vote principle, cautioning that "[a]n unrealistic overemphasis on raw population figures . . . may submerge. . . other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement." *Id.* at 749.[4]

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[4]The Court has previously upheld a New York reapportionment plan which used a citizen population as a basis, *WMCA Inc.* v. *Lomenzo*, 382 U.S. 4 (1965). In *Burns* v. *Richardson*, *supra*, the Court also approved the temporary registered voter plan based on the unique circumstances in Hawaii.

Pre-*Gaffney*: there was one lower court case which rejected anything but a raw population standard, *see Ellis* v. *Mayor of Baltimore*,

Under the *Burns* standard, New Mexico's population-based, votes-cast formula passes constitutional muster. Not only is raw census population data not constitutionally sacrosanct in the construction of legislative districts, but indeed it is not even preferable as the basis for the construction of legislative districts in New Mexico because such data represents a distorted reflection of the distribution of the State's voting-eligible citizenry. The votes-cast formula meets the particular needs of New Mexico and works well to distribute voting power fairly and equitably and in a manner which approximates the distribution of a permissible population base, thereby meeting the *Burns* standard. These arguments were erroneously ignored by the three-judge panel below.

Furthermore, the efforts of the New Mexico legislature to take ineligibles into account in the reapportionment process was a legitimate exercise of its constitutional powers and may not be ignored. As the Court explained in *Burns*:

> Neither in *Reynolds* v. *Sims* nor in any other decision has this Court suggested that the states are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against

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352 F.2d 123 (4th Cir. 1965), but even that opinion stood alone. *See, e.g., Buckley* v. *Hoff*, 243 F. Supp. 873 (D.Vt. 1965) (registered voter based reapportionment held valid); *Baker* v. *Carr*, 206 F. Supp. 341 (M.D.Tenn. 1962) (on remand) (Tennessee plan based on qualified voters); *WM.C.A. Inc.* v. *Lomenzo*, 238 F. Supp. 916 (S.D.N.Y.) (citizen population as a valid basis for reapportionment), *aff'd*, 382 U.S. 4 (1965).

Post-*Gaffney*: the lower courts have adopted the view that an apportionment based on factors other than raw census data is constitutionally permissible. *See e.g., Martin* v. *Venables*, 401 F. Supp. 611 (D. Conn. 1975) (town may constitutionally base apportionment on registered voters); *Winter* v. *Docking*, 373 F. Supp. 308 (D. Kans. 1974) (reapportionment based on agricultural census is valid); *cf., Goines* v. *Heiskell, 362 F. Supp. 313, 317 (S.D. W.Va.* 1973) (factors other than population are to be examined and weighed).

> which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such groups involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.

384 U.S. at 92.

Thus, a state's decision to adjust raw population by votes-cast, in order to derive a more accurate estimate of citizen population, represents a permissible choice of democratic theory concerning who ought to be considered in the relevant population base. After *Gaffney* and *Burns* it cannot be said that such a choice is constitutionally impermissible.[5]

B. Exclusive Use of Raw Census Data As The Basis For Reapportionment In New Mexico – Where There Are Numerous Pockets Of Ineligibles Spread Among Small Precincts and Election Districts – Would Create Rather Than Cure Malapportionment

The Court in *Gaffney* might well have had New Mexico in mind when it observed that "[t]he proportion of the census population too young to vote or disqualified by alienage or nonresidence varies substantially among the States and among localities within the States." 412 U.S. at 746-47. We have alluded above[6] to the transient concentrations which contribute materially to the malapportionment dangers presently confronting New Mexico. The State's position on the Mexican border seriously increases the potential for having resident non-citizens counted by the census. With small

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[5] A registered voter based method would not work under current New Mexico law. There is great liberality in the registration system and much local discretion with respect to purging the rolls. Basing the formula or mode of reapportionment on registered voters would be fraught with opportunities for abuse and manipulation on the local level, thereby undermining the integrity of the system. Indeed, the evidence introduced in the court below demonstrated that in several counties there were more registered voters on the rolls than census population over 18 years of age.

[6] *See* pp. 2-4, *supra*.

precincts and relatively small districts, use of gross population data could grossly distort the votes of the eligible voters. Thus, the State's use of raw population data would not only fail to ameliorate malapportionment as the district court maintains, but instead could create the very malapportionment Appellees claimed below they wish to avoid. *See* Legislative Findings G and H in Section 2, Appendices D & E, *infra*.

While the population-based, votes-cast formula does not eliminate the ineligible problem, it does limit its effects. By spreading ineligibles throughout the county, the formula ensures that pockets of ineligibles within given precincts will not have an undue effect on the legislative district within which the precinct lies. The New Mexico formula therefore permissibly neutralizes ineligibles or at least lessens their effect. On the other hand, use of the raw population model required by the district court would instead cause pockets of malapportionment.

C. Use Of The New Mexico Formula Represents A Sound And Constitutional State Policy Choice With Regard To The Dual Nature Of The One-Man, One-Vote Equation

New Mexico's use of the votes-cast formula represents a sound and constitutional policy choice balancing the equation of the one-man, one-vote principle in a way which gives due regard to both "persons" and "voters." Furthermore, the formula is appropriately tailored to fit the unique problems of New Mexico. The fourteenth amendment standard has sufficient latitude within it to allow the State to respond to those problems.

The New Mexico formula was first arrived at by the legislature to overcome the practical problem of translating census data to a form which could be utilized at the precinct level, and it continues to perform that important function in a way which facilitates the political process of apportioning. *See* Legislative Finding L. In addition, while not ignoring raw census population, the formula filters raw census data through a votes-cast lens in a manner which properly focusses on the duality of the one-man, one-vote principle.

First, as the court stated in *Gaffney* "if it is the weight of a person's vote that matters, total population—even if stable and accurately taken—may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because 'census persons' are not voters." 412 U.S. at 746. Thus, with regard to the "person" side of the equation, it is clear that a method based on total population alone will create an imbalance in favor of persons who happen to reside in districts with large numbers of otherwise ineligible persons.

Second, as the Court in *Gaffney* also made clear, census figures do not "tell anything at all about the proportion of all those otherwise eligible individuals whose vote cannot be counted or weighed because they either failed to register or failed to vote." 412 U.S. at 747-48. Therefore, on the "vote" side of the equation, it is apparent that a method based on votes cast alone may strike an imbalance in favor of those voters who happen to reside in districts with good voter turn-out statistics.

New Mexico's formula strikes a balance which moderates the potential excesses of either a "voters only" or a "population only" method. The votes-cast component of the formula, while not eliminating the ineligibles, spreads them throughout the population in such a way as not to overly dilute a given election district. The population base of the formula similarly serves as a check on the votes-cast component, thus providing protection for the rights of eligible voters who do not cast their votes.

Furthermore, the formula works well to balance the diverse factors which are found in the demographics of New Mexico. First, New Mexico has heavy concentrations of ineligibles, and those concentrations differ greatly throughout the varying counties and among precincts within those counties. Second, while the number of some types of ineligibles can be determined with a fair degree of precision and therefore may be accurately discounted (*e.g.*, the under-age population), many are far more difficult to count and as a practical matter defy any systematic method of discounting (*e.g.*, illegal aliens and transients). Third, election districts in New Mexico

are so small that relatively small numbers of ineligibles can grossly dilute any plan of apportionment based solely on population.

There are, for example, no systematic methods to assure that the proper balance will be struck with respect to problem pockets of population found at the State Penitentiary in Santa Fe or at Kirtland Air Force Base in Bernalillo County. *See Mahan* v. *Howell*, 410 U.S. 315, 330-31 (1973) . Indeed, the diversity of New Mexico's resident population, and the unique factors in the demography of the state, militate in favor of the formula's validity as a fair and reasonable method of deriving the relevant precinct population.

Thus, the population-based, votes-cast formula properly balances the excesses of both the "voters only" and "population only" approaches, all within a framework acceptable to the dictates of the fourteenth amendment. The district court ignored this Court's pronouncements in both *Burns* and *Gaffney* in finding the apportionment plan violated the one-man, one-vote principle. Because of the inconsistency of that decision with the established principles of this Court and the potential ramifications to apportionment schemes in New Mexico and other states, this Court should note probable jurisdiction.

CONCLUSION

Because of the substantiality of the constitutional question presented, Appellants respectfully request that the Court note probable jurisdiction and set this case for plenary consideration, including briefs on the merits and oral argument in support thereof.

Respectfully submitted,

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APPENDIX A
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FRANK I. SANCHEZ, *et al.*, *Plaintiffs*, v. BRUCE KING, Governor of New Mexico, *et al.* *Defendants.*	No. 82-67-M Civil
Consolidated With	
RAYMOND VARGAS, *et al.*, *Plaintiffs*, v. SHIRLEY HOOPER, Individually and as Secretary of State of the State of New Mexico, *et al.*, *Defendants.*	No. 82-84-C Civil
Consolidated With	
D. H. "CHILI" YAZZIE, *et al.*, *Plaintiffs*, v. SHIRLEY HOOPER, Secretary of State of New Mexico, *et al.*, *Defendants.*	No. 82-180-C Civil
Consolidated With	
RONALD G. OLGUIN, *et al.*, *Plaintiffs*, v. SHIRLEY HOOPER, Individually and as Secretary of State, *et al.*, *Defendants.*	No. 82-219-JB Civil
Consolidated With	
PATRICIA M. MARSH, *Plaintiff*, v. BRUCE KING, Individually and as Governor of the State of New Mexico, *et al.*, *Defendants.*	No. 82-246-JB Civil

Filed in My Office,
Apr. 5, 1982
Jesse Casaus, Clerk

PRELIMINARY INJUNCTION

Plaintiffs in these consolidated cases are eligible voters in the State of New Mexico and they challenge the 1982 reapportionment of the New Mexico Legislature. 1982 New Mexico Laws, Chapter I and II. Jurisdiction is proper under 28 U.S.C. §§ 1331 and 1343(3) (1976) and a Three-Judge Court has been impanelled. 28 U.S.C. § 2284 (1976). Although plaintiffs offer several grounds to support their challenge to reapportionment, the issue now presented for consideration is the validity of the Reapportionment Acts under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Plaintiffs seek to enjoin the State of New Mexico from conducting any election under the revised apportionment. April 6, 1982 is the deadline for candidates for the New Mexico Senate and House of Representatives to file petitions for candidacy. Although we have not yet had sufficient opportunity to consider the merits of plaintiffs' claims, we do conclude that plaintiffs will more probably than not prevail on the merits of their claims and that plaintiffs will suffer irreparable injury if elections proceed under the revised apportionment. We further find that the proof of threatened injury to the plaintiffs outweighs any damage that the proposed injunction will cause the defendants and that if the injunction issues it will not be adverse to the public interest.

The record demonstrates that the application of the "votes-cast formula" for ascertaining precinct population causes substantial variations between the presumed precinct populations for reapportionment purposes and the actual precinct populations as determined from United States Census data. The deviations demonstrated by plaintiffs appear to exceed any which have heretofore passed constitutional scrutiny. Plaintiffs will suffer irreparable injury if elections proceed under a constitutionally infirm apportionment plan. Now, Therefore,

IT IS ORDERED that the deadline of April 6 1982 for filing petitions for candidacy for the New Mexico House of Representatives and Senate shall be, and hereby is, enjoined indefinitely.

UNITED STATES CIRCUIT JUDGE

/s/
UNITED STATES DISTRICT JUDGE

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX B
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FRANK I. SANCHEZ, *et al.*, *Plaintiffs,* v. BRUCE KING, Governor of New Mexico, *et al.* *Defendants.*	)	No. 82-67-M Civil
		Consolidated With
RAYMOND VARGAS, *et al.*, *Plaintiffs,* v. SHIRLEY HOOPER, Individually and as Secretary of State of the State of New Mexico, *et al.*, *Defendants.*	)	No. 82-84-C Civil
		Consolidated With
D. H. "CHILI" YAZZIE, *et al.*, *Plaintiffs,* v. SHIRLEY HOOPER, Secretary of State of New Mexico, *et al.*, *Defendants.*	)	No. 82-180-C Civil
		Consolidated With
RONALD G. OLGUIN, *et al.*, *Plaintiffs,* v. SHIRLEY HOOPER, Individually and as Secretary of State, *et al.*, *Defendants.*	)	No. 82-219-JB Civil
		Consolidated With
PATRICIA M. MARSH, *Plaintiff,* v. BRUCE KING, Individually and as Governor of the State of New Mexico, *et al.*, *Defendants.*	)	No. 82-246-JB Civil

Filed in My Office,
Apr. 8, 1982
Jesse Casaus, Clerk

MEMORANDUM OPINION AND ORDER

The record demonstrates that the application of the formula for ascertaining precinct population mandated by the 1982 House Reapportionment Act and the 1982 Senate Reapportionment Act passed by the New Mexico Legislature in special session causes substantional variations between the numbers thereby derived and United States Census figures. This comes about by reason of the inclusion of the *total vote* cast as an element of the formula. These variations are not constant throughout the counties, districts or precincts. With respect to House districts created by the 1982 Reapportionment Act, the maximum deviation of actual population from the population ideal is 94%. With respect to Senate districts, the maximum deviation from the population ideal is 83%. The disparities have such consequence that we conclude that the "votes cast formula" in Section 6 of both Acts leads to a result which is constitutionally impermissible.

The recitations in each of the Acts as to their reasons and purposes cannot be regarded as ground for an exception to a reliance on population figures. "Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." *Reynolds v. Sims*, 377 U.S. 533, 567 (1964). Use of a registered voter or actual voter basis in reapportionment can be sustained only when it produces "a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." *Burns v. Richardson*, 384 U.S. 73, 93 (1966). And while a state can justify the consideration of factors other than population by showing that those considerations further a rational state policy, those factors "cannot constitutionally be permitted to emasculate the goal of substantial equality." *Mahan v. Howell*, 410 U.S. 315, 326 (1973).

Reapportionment is a legislative function, and the location and shape of districts is within the discretion of the State Legislature so long as the Constitution is complied with. Factors

other than numbers may be appropriate ingredients. Courts are not designed to perform the task of reapportionment and judicial relief becomes appropriate only when a State Legislature fails to reapportion according to federal constitutional standards, after having had an adequate opportunity to do so. *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). Accordingly, we will allow the New Mexico Legislature an adequate opportunity to reapportion itself. The Legislature must make an honest and good-faith effort to construct the legislative districts as nearly of equal population as is practicable. *Reynolds v. Sims*, at 577.

There was much testimony at the hearing as to the accuracy of the census count, and the use of "substitutions" and "imputations" when actual counts could not be made. The fact remains, however, that the census figures, with adjustments for obvious errors which can always occur, are the only reliable and official figures available.

These census figures are, however, derived from blocks or enumeration districts, the boundaries of which do not coincide, for the most part, with precinct lines. The census blocks or districts use boundaries which are visible to the enumerators on the ground while precinct boundaries do not necessarily follow features on the ground such as roads, ditches or streets. Since the boundaries of the two geographical areas do not coincide, and if the census figures are to be used, it is necessary to allocate population figures from the census areas to the precincts to obtain a precinct count.

This allocation of numbers required when the block or enumeration districts cross precinct lines is a matter, according to the record, which must be carefully done with some knowledge of the community or area and with the use of notations on maps. The record shows that such allocations made by the Bureau of Census, which covered only a limited number of areas, were the product of clerical functions made in the Washington office. Similar clerical functions are available to the State, and no reason appears why the State cannot make similar allocations. However, we do not attempt to instruct the Legislature on the method to employ in again attempting

reapportionment. What we do require is that the Legislature employ a good-faith effort to construct legislative districts on the basis of actual population. Now, Therefore,

IT IS ADJUDGED and DECREED that the 1982 Reapportionment of the New Mexico Legislature, 1982 New Mexico Laws Chapters I and II is unconstitutional.

UNITED STATES CIRCUIT JUDGE

/s/
UNITED STATES DISTRICT JUDGE

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

FRANK I. SANCHEZ, *et al.*,
Plaintiffs,
v.
BRUCE KING, Governor of New Mexico, *et al.*
Defendants.

No. 82-67-M Civil

Consolidated With

RAYMOND VARGAS, *et al.*,
Plaintiffs,
v.
SHIRLEY HOOPER, Individually and as Secretary of State of the State of New Mexico, *et al.*,
Defendants.

No. 82-84-C Civil

Consolidated With

D. H. "CHILI" YAZZIE, *et al.*,
Plaintiffs,
v.
SHIRLEY HOOPER, Secretary of State of New Mexico, *et al.*,
Defendants.

No. 82-180-C Civil

Consolidated With

RONALD G. OLGUIN, *et al.*,
Plaintiffs,
v.
SHIRLEY HOOPER, Individually and as Secretary of State, *et al.*,
Defendants.

No. 82-219-JB Civil

Consolidated With

PATRICIA M. MARSH,
Plaintiff,
v.
BRUCE KING, Individually and as Governor of the State of New Mexico, *et al.*,
Defendants.

No. 82-246-JB Civil

Filed
United States District Court
Roswell, New Mexico
Apr. 29, 1982
Jesse Casaus, Clerk

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Bruce King and Shirley Hooper, the Defendants in the above-captioned cause, hereby appeal to the Supreme Court of the United States from the Preliminary Injunction, entered in this action on April 5, 1982, and the Memorandum Opinion and Order, entered on April 8, 1982, which continued, indefinitely, the Preliminary Injunction of April 5, 1982.

This appeal is taken pursuant to 28 U.S.C. §1253.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April, 1982, a copy of the foregoing Notice of Appeal was mailed, with first class postage prepaid, to the following counsel of record for each of the parties to this cause:

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APPENDIX D

THE LEGISLATURE
of the
STATE OF NEW MEXICO

35th Legislature, 2nd Special Session

LAWS 1982

CHAPTER 1

House Voters and Elections Committee Substitute for House Bill 3, as Amended, With Emergency Clause

Introduced by

AN ACT

RELATING TO THE REAPPORTIONMENT OF THE HOUSE OF REPRESENTATIVES; ESTABLISHING REPRESENTATIVE DISTRICTS; PROVIDING THE METHOD OF ELECTING REPRESENTATIVES; PROVIDING FOR THE FILLING OF VACANCIES; FIXING THE NUMBER, RESIDENCE AND TERMS OF REPRESENTATIVES; REPEALING CERTAIN SECTIONS OF THE NMSA 1978; DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.–This act may be cited as the "1982 House Reapportionment Act".

Section 2. FINDINGS OF FACT.–The legislature finds that:

A. the equal protection clause of the fourteenth amendment of the constitution of the United States guarantees to each eligible voter of this state that his vote for his elected representative in the state legislature shall be of substantially equal weight as the vote of every other eligible voter in the state for his elected representative in the state legislature;

B. to secure these rights, the legislature has the inherent power and is vested by the constitution of New Mexico with the authority to apportion its membership;

C. while the ideal basic unit of apportionment would be a compact geographical unit of known boundaries, containing an enumerated number of eligible voters small enough in size to permit flexibility in drawing legislative districts and from which there could be an orderly conduct of an election based on such apportionment, no such ideal basic unit exists;

D. the bureau of the census of the United States department of commerce, despite efforts of the state for almost twenty years and after numerous statements by the courts, does not enumerate persons or eligible voters residing in the election precincts of this state nor does it provide alternative basic apportionment units with enumerated populations in such form as to be of practical use in the apportionment of the state legislature;

E. the bureau of the census of the United States department of commerce provided the age breakdown of the population on or about December 15, 1981, too late to alter the work done in preparation for this session by basing the formula or plans on that part of the population of voting age, rather than total population, and thereby possibly achieving plans more in keeping with the spirit of the "one-person, one-vote" concept;

F. the smallest units for which census enumeration is available are enumeration districts and blocks. Enumeration districts, which do have definable boundaries on the map, cover only rural areas of the state or small municipalities of less than ten thousand population for which block data has not been requested. Blocks, which do not have definable boundaries on the map, are difficult to describe, are more than eighteen thousand in number and frequently cross election precinct lines and municipal boundaries. In only a few instances do either enumeration districts or blocks coincide with the election precincts of this state;

G. specific examples have been identified where gross errors exist in the currently available census data such as the reporting of a large residential population where none exists and census population which includes transients, institutionalized persons and persons under the age of eighteen, none of whom are eligible to vote in New Mexico;

H. enumeration errors and inclusions of ineligible voters, wherever they occur in the 1980 census, unequally weigh the votes of the voters for their elected representatives in the legislature;

I. the basic administrative unit for the conduct of elections in New Mexico is the election precinct, upon which the state's entire Election Code is structured, and use of census enumeration districts and city blocks would entail a redrawing and mapping of one thousand one hundred seventy precincts in thirty-three counties in order to conduct an election under the apportionment;

J. redefining of precinct boundaries would not only entail significant administrative cost but could not be completed in time for the holding of the 1982 primary and general elections;

K. the statutory formula contained in the 1982 House Reapportionment Act, while not the perfect solution to the problem of enumerating eligible voters or resident persons in the state's election precincts, is nevertheless a rational and practical solution which has served the state in the 1963, 1965, 1966, 1971 and 1972 apportionments and which was originally suggested by the state district court and has been sustained or unchallenged in three state cases and one federal case in New Mexico;

L. the statutory formula contained in the 1982 House Reapportionment Act for deriving precinct population employs enumerated state and county populations and total votes cast in election precincts as the controlling factors, is impartial in its application, is applied uniformly across the state and implements a rational statewide plan which comes closest to the spirit embodied in the "one-person, one-vote" concept in that it eliminates unequal weight given to the votes of persons resident within districts containing large numbers of persons not eligible to vote; and

M. the reapportionment and districting of the house made by the 1982 House Reapportionment Act constitutes a good faith effort on the part of the thirty-fifth legislature to provide house constituencies within the spirit and limitations of the equal protection clause of the fourteenth amendment of the United States constitution.

Section 3. MEMBERSHIP.–The house shall be composed of seventy members to be elected from districts which shall, insofar as is practicable and possible, be composed of an equal number of persons and be compact and contiguous.

Section 4. RESIDENCE.–Any candidate for the office of representative shall reside in the district for which he files his declaration of candidacy, at the time of such filing. Thereafter, if any representative permanently removes his residence from or maintains no residence in the district from which he

was elected, then he shall be deemed to have resigned and his successor shall be selected as provided in Section 7 of the 1982 House Reapportionment Act.

Section 5. PRECINCTS.–Precinct designations and boundaries used in districting by the legislature for reapportionment shall be those precinct designations and boundaries set by the boards of county commissioners of the respective counties for the 1980 general election unless otherwise specified.

Section 6. PRECINCT POPULATIONS.–

A. Since the bureau of the census of the United States department of commerce does not, in making its enumeration of the population of New Mexico, use precincts as the basic unit of enumeration and since a good faith effort of the legislature to have the bureau of the census provide an enumeration of the population of such precincts or an equivalent computation thereof was to no avail for the 1980 census, it is deemed necessary for the reapportionment plan to derive by formula populations of such precincts as follows:

$$\frac{\text{COUNTY POPULATION ACCORDING TO THE LAST OFFICIAL UNITED STATES CENSUS}}{\text{TOTAL VOTE CAST IN THE COUNTY IN THE MOST RECENT GENERAL ELECTION}} \times \text{TOTAL VOTE CAST IN EACH PRECINCT IN THE MOST RECENT GENERAL ELECTION.}$$

B. The derived population of each representative district shall be the sum of the derived populations of each precinct within the district, and the derived population of all precincts within a county shall add up to the total population for the county provided by the last official United States decennial census.

C. The boards of county commissioners shall not create any precinct which lies in more than one representative district, nor shall the boards of county commissioners divide any precinct so that the divided parts of the precinct are situated in two or more representative districts. Votes cast in any

general, primary or other statewide election from precincts created or divided in violation of this subsection shall be invalid and shall not be counted or canvassed.

Section 7. ELECTIONS–VACANCIES.–

A. Members of the house of representatives shall be elected for terms of two years.

B. If a vacancy occurs in the office of representative for any reason, the vacancy shall be filled as follows:

(1) in any representative district situated wholly within the exterior boundaries of a single county, by appointment of the board of county commissioners of that county;

(2) in any representative district situated within an area composed of two or more counties, by the following method:

(a) the board of county commissioners of each county in the representative district shall submit one name to the governor; and

(b) the governor shall appoint the representative to fill the vacancy from the list of names so submitted; and

(3) all appointments to fill vacancies in the house of representatives shall be for a term ending on December 31 subsequent to the next succeeding general election.

Section 8. PROVISIONAL TERMS.–While the legislature is informed and believes that the apportionment and districting plan set forth in the 1982 House Reapportionment Act is constitutional and constitutes a good faith effort of the legislature to comply with the provisions of the equal protection clause of the fourteenth amendment of the United States constitution, should this belief turn out to be invalid, by reason of a judgment of a court of competent jurisdiction, then members of the house of representatives elected at the 1980 general election shall continue to serve the terms for which they were elected and qualified in 1980 until such time

as the legislature has enacted a valid apportionment and districting plan for the house of representatives, but such extension may not extend beyond January 1, 1984.

Section 9. DISTRICTS.–The reapportionment of the house of representatives shall be as set out in the following seventy sections of the 1982 House Reapportionment Act.

[Sections 10 through 79, listing the counties and precincts included in each district, are omitted.]

Section 80. REPEAL.–Sections 2-7-1 through 2-7-88 NMSA 1978 (being Laws 1972, Chapter 58, Sections 1 through 88) are repealed.

Section 81. EMERGENCY.–It is necessary for the public peace, health and safety that this act take effect immediately.

APPENDIX E

THE LEGISLATURE
of the
STATE OF NEW MEXICO

35th Legislature, 2nd Special Session

LAWS 1982

CHAPTER 2

Senate Rules Committee Substitute for Senate Bill 1, as amended

Introduced by



AN ACT

RELATING TO THE REAPPORTIONMENT OF THE SENATE; ESTABLISHING SENATORIAL DISTRICTS; PROVIDING THE METHOD OF ELECTING SENATORS; PROVIDING FOR THE FILLING OF VACANCIES; FIXING THE NUMBER, RESIDENCE AND TERMS OF SENATORS; REPEALING CERTAIN SECTIONS OF THE NMSA 1978.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.–This act may be cited as the "1982 Senate Reapportionment Act".

Section 2. FINDINGS OF FACT.–The legislature finds that:

A. the equal protection clause of the fourteenth amendment of the constitution of the United States guarantees to each eligible voter of this state that his vote for his elected representative in the state legislature shall be of substantially equal weight as the vote of every other eligible voter in the state for his elected representative in the state legislature;

B. to secure these rights, the legislature has the inherent power and is vested by the constitution of New Mexico with the authority to apportion its membership;

C. while the ideal basic unit of apportionment would be a compact geographical unit of known boundaries, containing an enumerated number of eligible voters small enough in size to permit flexibility in drawing legislative districts and from which there could be an orderly conduct of an election based on such apportionment, no such ideal basic unit exists;

D. the bureau of the census of the United States department of commerce, despite efforts of the state for almost twenty years and after numerous statements by the courts, does not enumerate persons or eligible voters residing in the election precincts of this state nor does it provide alternative basic apportionment units with enumerated populations in such form as to be of practical use in the apportionment of the state legislature;

E. the smallest units for which census enumeration is available are enumeration districts and blocks. Enumeration districts, which do have definable boundaries on the map, cover only rural areas of the state or small municipalities of less than ten thousand population for which block data has not been requested. Blocks, which do not have definable boundaries on the map, are difficult to describe, are more than eighteen thousand in number and frequently cross election precinct lines and municipal boundaries. In only a few instances do either enumeration districts or blocks coincide with the election precincts of this state;

F. specific examples have been identified where gross errors exist in the currently available census data such as the reporting of a large residential population where none exists and census population which includes transients, institutionalized persons and persons under the age of eighteen, none of whom are eligible to vote in New Mexico;

G. enumeration errors and inclusions of ineligible voters, wherever they occur in the 1980 census, unequally weigh the votes of the voters for their elected representatives in the legislature;

H. the basic administrative unit for the conduct of elections in New Mexico is the election precinct, upon which the state's entire Election Code is structured, and use of census enumeration districts and city blocks would entail a redrawing and mapping of one thousand one hundred seventy precincts in thirty-three counties in order to conduct an election under the apportionment;

I. redefining of precinct boundaries would not only entail significant administrative cost but could not be completed in time for the holding of the 1982 primary and general elections;

J. the statutory formula contained in the 1982 Senate Reapportionment Act, while not the perfect solution to the problem of enumerating eligible voters or resident persons in the state's election precincts, is nevertheless a rational and practical solution which has served the state in the 1963, 1965, 1966, 1971 and 1972 apportionments and which was originally

suggested by the state district court and has been sustained or unchallenged in three state cases and one federal case in New Mexico;

K. the statutory formula contained in the 1982 Senate Reapportionment Act for deriving precinct population employs enumerated state and county populations and total votes cast in election precincts as the controlling factors, is impartial in its application, is applied uniformly across the state and implements a rational statewide plan which comes closest to the spirit embodied in the "one-person, one-vote" concept in that it eliminates unequal weight given to the votes of persons resident within districts containing large numbers of persons not eligible to vote; and

M. the reapportionment and districting of the senate made by the 1982 Senate Reapportionment Act constitutes a good faith effort on the part of the thirty-fifth legislature to provide senate constituencies within the spirit and limitations of the equal protection clause of the fourteenth amendment of the United States constitution.

Section 3. MEMBERSHIP.–The senate shall be composed of forty-two members to be elected from districts which shall, insofar as is practicable and possible, be composed of an equal number of persons and be compact and contiguous.

Section 4. RESIDENCE.–Any candidate for the office of senator shall reside in the district for which he files his declaration of candidacy, at the time of such filing. Thereafter, if any senator permanently removes his residence from or maintains no residence in the district from which he was elected, then he shall be deemed to have resigned and his successor shall be selected as provided in Section 7 of the 1982 Senate Reapportionment Act.

Section 5. PRECINCTS. Precinct designations and boundaries used in districting by the legislature for reapportionment shall be those precinct designations and boundaries set by the boards of county commissioners of the respective counties for the 1980 general election unless otherwise specified.

Section 6. PRECINCT POPULATIONS.–

A. Since the bureau of the census of the United States department of commerce does not, in making its enumeration of the population of New Mexico, use precincts as the basic unit of enumeration and since a good faith effort of the legislature to have the bureau of the census provide an enumeration of the population of such precincts or an equivalent computation thereof was to no avail for the 1980 census, it is deemed necessary for the reapportionment plan to derive by formula populations of such precincts as follows:

$$\frac{\text{COUNTY POPULATION ACCORDING TO THE LAST OFFICIAL UNITED STATES CENSUS}}{\text{TOTAL VOTE CAST IN THE COUNTY IN THE MOST RECENT GENERAL ELECTION}} \times \text{TOTAL VOTE CAST IN EACH PRECINCT IN THE MOST RECENT GENERAL ELECTION.}$$

B. The derived population of each senatorial district shall be the sum of the derived populations of each precinct within the district, and the derived population of all precincts within a county shall add up to the total population for the county provided by the last official United States decennial census.

C. The boards of county commissioners shall not create any precinct which lies in more than one senatorial district, nor shall the boards of county commissioners divide any precinct so that the divided parts of the precinct are situated in two or more senatorial districts. Votes cast in any general, primary or other statewide election from precincts created or divided in violation of this subsection shall be invalid and shall not be counted or canvassed.

Section 7. ELECTIONS–VACANCIES.–

A. Members of the senate shall be elected for terms of four years.

B. If a vacancy occurs in the office of senator for any reason, the vacancy shall be filled as follows:

(1) in any senatorial district situated wholly within the exterior boundaries of a single county, by appointment of the board of county commissioners of that county;

(2) in any senatorial district situated within an area composed of two or more counties, by the following method:

(a) the board of county commissioners of each county in the senatorial district shall submit one name to the governor; and

(b) the governor shall appoint the senator to fill the vacancy from the list of names so submitted;

(3) all appointments to fill vacancies in the senate shall be for a term ending on December 31 subsequent to the next succeeding general election at which general election a person shall be elected to fill the remainder of the unexpired term; and

(4) any appointment to fill a vacancy in the senate made after the effective date of this 1982 act shall be for a term ending December 31, 1984 and from the districts as set out in the 1972 apportionment act.

Section 8. DISTRICTS.–The reapportionment of the senate shall be as set out in the following forty-two sections of the 1982 Senate Reapportionment Act.

[Sections 9 through 50, listing the counties and precincts included in each district, are omitted.]

Section 51. ELIMINATION OF UNEQUAL STAGGERING–DECLARATION OF LEGISLATIVE FINDINGS AND INTENT.–The legislature finds and declares that:

A. the constitution of New Mexico does not require staggered terms for senators;

B. only once since statehood has the apportionment for the senate provided for staggered terms for an equal number of senators;

C. it was the intent of the 1972 Senate Reapportionment Act that the senate be no longer staggered with re-

spect to the terms of its members; however, because of a special court ruling, there is de facto unequal staggering of terms in that thirty-five senators are elected at one general election and seven senators are elected at the subsequent general election;

D. such unequal staggering is contrary to the intent and theory of having staggered terms and serves no functional or theoretical purpose and is not in the best interest of the senate; and

E. it is in the best interest of the senate and the legislature that all such unequal staggering be abolished, and it is the intent of the 1982 Senate Reapportionment Act that all members of the senate be elected at the same general election for the same term of office except where necessary to fill a vacancy in the office of a senator for the remainder of the unexpired term.

Section 52. FIRST ELECTION OF SENATORS.–The first election of members of the senate after the effective date of the 1982 Senate Reapportionment Act shall be at the general election in 1984.

Section 53. REPEAL.–Sections 2-8-1 through 2-8-53 NMSA 1978 (being Laws 1972, Chapter 79, Sections 1 through 53) are repealed.

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No. 61-1365

IN THE

Supreme Court of the United States

October Term 1961

BRUCE KING, Governor of the State of New Mexico, and SHIRLEY HOOPER, Secretary of State of the State of New Mexico,

Appellants,

vs.

FRANK I. SANCHEZ, et al., RAYMOND VARGAS, et al., D.H. "CHILI" YAZZIE, et al., RONALD G. OLGUIN, et al., and PATRICIA M. MARSH,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MOTION OF APPELLEES FRANK I. SANCHEZ, ET AL. AND D. H. "CHILI" YAZZIE, ET AL. TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether, in holding unconstitutional the January, 1982 New Mexico legislative reapportionment, the District Court clearly erred in finding that population deviations ranging to 83% in the House and 94% in the Senate failed to satisfy the one-person, one-vote rule and violated the test of *Burns* v. *Richardson*, 384 U.S. 73, 93 (1966) that there be no substantial difference in result by using a basis for reapportionment other than population.

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No. 81-2385

IN THE

Supreme Court of the United States

October Term 1981

BRUCE KING, Governor of the State of New Mexico, and SHIRLEY HOOPER, Secretary of State of the State of New Mexico,

Appellants,

vs.

FRANK I. SANCHEZ, et al., RAYMOND VARGAS, et al., D.H. "CHILI" YAZZIE, et al., RONALD G. OLGUIN, et al., and PATRICIA M. MARSH,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of this Court's rules and by undersigned counsel, Appellees Frank I. Sanchez, et al. and D. H. "Chili" Yazzie, et al., respectfully move that this appeal be dismissed as moot and alternatively that the judgment of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINIONS BELOW

The April 5, 1982, opinnion and order of the District Court, granting a preliminary injunction, J.S. App. at A-1 -

A-3, is unreported. The April 8, 1982, opinion and order of the District Court, adjudicating the 1982 New Mexico legislative reapportionment unconstitutional, J.S. App. at B-1 - B-4, is also unreported.

JURISDICTION

The orders of the District Court, J.S. App. at A-1 - A-3 and B-1 - B-4, were entered on April 5 and 8, 1982. The notice of appeal, J.S. App. at C1 - C-2, was filed by Defendants on April 29, 1982. The appeal was docketed in this Court on June 28, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

STATEMENT

Your Appellees, Frank I. Sanchez, et al., and D. H. "Chili" Yazzie, et al., fully join and concur in the Motion to Affirm filed herein by Appellees Raymond Vargas, et al., and will not repeat here the detailed arguments of that pleading. Rather, your Appellees will supplement and highlight that pleading.

This case is a simple one. In January, 1982, the New Mexico Legislature redistricted using a votes-cast formula to project the 1980 population of precincts. These precincts were then combined to form legislative districts. At trial, Plaintiffs produced expert testimony to demonstrate that when measurd by actual population, the deviations of the districts ranged to 83% in the House and 94% in the Senate and that the most under-represented districts were those with the highest concentrations of minority (Black, Indian, Mexican-American) population. The Defendants did not seriously contest this evidence, but urged that their legitimate interest in excluding ineligibles (aliens, institutionalized persons, transient military, etc.) from the reapportionment base was accom-

plished by the votes-cast formula. However, Defendants failed to produce any substantial evidence that their formula in fact promoted this goal. The District Court did not have to reach the question of the legitimacy of the state's purported goal of excluding ineligible voters from the apportionment base, since it was able to conclude as a factual matter that the votes-cast formula did nothing to promote the accomplishment of that goal.

Accordingly, upon these facts the District Court had little difficulty in declaring the January, 1982 reapportionment invalid. As a remedy, the District Court directed that the Legislature reapportion using actual 1980 Census population to compute the populations of precincts, which could then be combined to form districts of equal population.

ARGUMENT

The judgment of the District Court should be dismissed as moot or alternatively should be summarily affirmed because it was based upon factual findings and factual application of a clear mandate of this Court, and does not raise issues of the stature which would make appropriate plenary review by this Court.

I

THIS APPEAL SHOULD BE DISMISSED FOR MOOTNESS

The Defendants noticed appeal from the district court's order on April 29, 1982. However, the Defendants-Appellants did not move for a stay of the district court's order in this Court, but have proceeded to enact another plan. Subsequent to the district court's order, the Defendants contracted with the Census Bureau and other experts and obtained computations of the 1980 Census population

by precincts. Using this accurate precinct population data, the New Mexico Legislature went into special session in June, 1982 and produced plans for the House and the Senate. Under the provisions of these June, 1982 Acts, special primary elections for the Legislature are to be conducted on August 31, 1982 pursuant to the new plans.

The Plaintiffs have renewed their challenges of racial discrimination in the delineation of certain district lines in four areas of the state with respect to the House (but not the Senate) under the June, 1982 plan. The Plaintiffs did not challenge the accuracy of the new precinct population data. The district court conducted a trial on the gerrymandering challenges beginning on August 4, 1982 and presently has the case under advisement.

The Defendants-Appellants by not seeking a stay in this Court, by enacting a new legislative redistricting plan, and by providing for the election of a legislature under this new plan, have rendered the issue of this case stale and its outcome inconsequential.

The June, 1982 Acts do provide for repeal in the event this Court would uphold the January, 1982 plan. However, this breathes only most uncertain future life into the issues of the January, 1982 plan because a new Legislature will be elected in 1982 pursuant to the later enacted plan. The Defendants-Appellants appear to be asking this Court to issue an advisory opinion and are seeking plenary review only, in their words: "because the issues are of great importance to the State of New Mexico in *planning future elections.*" J.S. at 6 (emphasis added).

By the time this case reaches the Court, a new Legislature will have been elected and be sitting pursuant to

the June, 1982 plan (based on accurate 1980 population data) and the district court will have issued a ruling as to the validity of the House districts challenged by Plaintiffs in the second round of litigation. If these considerations do not render the case moot, they argue most strongly for a quick resolution of the insubstantial claims of Defendants-Appellants. A determination of mootness or a summary affirmance of the unconstitutionality of the January, 1982 plan would close that chapter of the 1980 round of New Mexico Legislative redistricting, and clear the air and the dockets of this stale battle.

II

THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT DEVIATIONS OF 83% IN THE HOUSE AND 94% IN THE SENATE FAILED TO SATISFY THE ONE-PERSON, ONE-VOTE RULE AND THE CRITERIA OF *BURNS* v. *RICHARDSON*, 384 U.S. 73, FOR LEGISLATIVE PLANS NOT BASED ON POPULATION.

Appellants, in an attempt to obtain plenary review, mischaracterize the holding of the district court to imply that it is contrary to the rule of law announced in *Burns* v. *Richardson*, 384 U.S. 73 (1966). On the contrary, the district court most scrupulously followed the dictates of *Burns*, but made factual findings (including deviation ranges of 83% and 94%) which under *Burns* required a holding of unconstitutionality of the January, 1982 plans. These findings should not be disturbed unless clearly erroneous under Fed. Rule Civ. Pro. 52. *Rogers* v. *Lodge* 50 U.S.L.W. 5041, 5045 (III A) (U.S. July 1, 1982).

Burns v. *Richardson, supra*, supported by the dicta in *Gaffney* v. *Cummings*, 412 U.S. 735, 746-49 (1973), requires

that before a population base more narrow than total population may be employed, the state must prove: 1) that there exists "special population problems" necessitating departure from a total population base, 2) that the method employed substantially duplicates the result that would be obtained by employing a permissible population base, 384 U.S. at 95, and 3) that the data and method employed does not have an adverse impact on minorities by underrepresenting "groups constitutionally entitled to participate in the electoral process", 384 U.S. at 92-93. See also, *Ely* v. *Klahr*, 403 U.S. 108 (1971).

The district court did not dispute the three rquirements of *Burn;*, rather, it found facts in the instant case, which, *pursuant* to the *Burns* criteria, required finding a violation of the one-person, one-vote rule.

At trial, the Defendants offered no "special population problems" akin to those of Hawaii in 1966, and the fact that Defndants have now obtained accurate population figures by precincts suggests that any practical difficulties that they may have experienced could have been easily overcome.

Similarly, the Defendants offered no study or other testimony to demonstrate that the votes-cast formula approximated some permissible population base. Plaintiffs produced data which demonstrated that when measured by the usual base, total population, the districts of Defendants' plan were grossly unequal, having a deviation range of 83% in the House and 94% in the Senate.

With respect to the third criteria, evidence by several of Plaintiffs' expert witnesses established that the brunt of the inaccuracies of the votes-cast formula was borne

by New Mexico's minorities. The most underrepresented districts consistently contained the highest percentage of minority population and the most overrepresented districts consistently contained the lowest percentage of minority population.

The district court, applying the criteria of *Burns* v. *Richardson*, *supra*, and cognizant of the admonition of *Mahan* v. *Howell*, 410 U.S. 315, 326 (1973), found facts which required a holding of unconstitutionality of the January, 1982 New Mexico legislative reapportionment.

CONCLUSION

The decision of the district court is a straightforward application of a clear rule of law and turns on the factual findings of the trial court. The case does not raise the type of issue which would warrant the Court's plenary consideration and is thoroughly stale if not moot, by virtue of the Legislature's June, 1982 enactments.

Accordingly, your Appellees respectfully urge that this case be dismissed as moot, and alternatively that the decision below be summarily affirmed without full briefing and oral argument.

Respectfully submitted,

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CERTIFICATE

I, Stanley A. Halpin, Jr., Attorney for Appellees and a member of the Bar of the United States Supreme Court, do hereby certify that on this 30th day of August, 1982, I served three copies of the foregoing Motion to Dismiss or Affirm, by mail, postage prepaid to the attorneys of record herein:

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CLERK

No. 81-2395

IN THE

Supreme Court of the United States

October Term 1981

BRUCE KING, Governor of the State of New Mexico, and SHIRLEY HOOPER, Secretary of State of the State of New Mexico,

Appellants,

vs.

FRANK I. SANCHEZ, et al., RAYMOND VARGAS, et al., D.H. "CHILI" YAZZIE, et al., RONALD G. OLGUIN, et al., and PATRICIA M. MARSH,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MOTION OF APPELLEES RAY VARGAS, AL VALDEZ AND THE AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO TO AFFIRM

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QUESTION PRESENTED

Whether the district court erred in holding that the 1982 reapportionment of the New Mexico legislature, based on formulaic estimates of population demonstrated to be grossly and systematically in error and which yielded legislative districts with population deviations in excess of 90% from ideal population, violates the one-person, one-vote principle of the equal protection clause of the fourteenth amendment?

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II.

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No. 81-2385

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BRUCE KING, Governor of the State of New Mexico, and SHIRLEY HOOPER, Secretary of State of the State of New Mexico,

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vs.

FRANK I. SANCHEZ, et al., RAYMOND VARGAS, et al., D.H. "CHILI" YAZZIE, et al., RONALD G. OLGUIN, et al., and PATRICIA M. MARSH,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MOTION TO AFFIRM

Raymond Vargas, Al Valdez, and the American Civil Liberties Union of New Mexico, by counsel and pursuant to Rule 16(1) (c) of this Court's rules, move that the judgment of the district court in this case be affirmed.

OPINIONS BELOW

The April 5, 1982, opinion and order of the district court, granting a preliminary injunction, J.S. App. at A-1 - A-3, is unreported. The April 8, 1982, opinion and order of the district court, adjudicating the 1982 New Mexico legislative reapportionment unconstitutional, J.S. App. at B-1 - B-4, is also unreported.

JURISDICTION

The orders of the district court, J.S. App. at A-1 - A-3 and B-1 - B-4, were entered on April 5 and 8, 1982. The notice of appeal, J.S. App. at C-1 - C-2, was filed by defendants on April 29, 1982. The appeal was docketed in this Court on June 28, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

STATEMENT

1. These five consolidated suits involve the constitutionality of the January 1982 New Mexico House and Senate reapportionment plans,[1] under the one-person, one-vote principles of the fourteenth amendment. On January 16, 1982, the New Mexico House and Senate reapportionment plans were enacted by a special session of the New Mexico legislature. These reapportionment plans were based not on actual population counts but rather were based on artificial population figures "derived" from a "votes-cast" formula. Like many states, New Mexico employs as the building blocks of legislative districts for reapportionment political geographic units (precincts) which differ from the geographic units (blocks and enumeration districts) employed for the decennial census count by the U.S. Census Bureau. Therefore, the official 1980 census data did not readily provide census counts for the precincts in New Mexico. Unlike the other states with similar problems, New Mexico did not seek to convert the census data to precinct counts or estimates. Instead, the New Mexico legislature employed the "votes-cast" formula.

The formula starts with the 1980 official census count for the total population of the county and then assigns to

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[1]The House reapportionment plan is found in J.S. App. at D-1 - D-7, and the Senate reapportionment plan is found in J.S. App. at E-1 - E-7.

the several precincts in that county derived population figures determined by the proportion of votes cast in the precincts to votes cast in the county.[2] These derived precinct populations are used to determine the populations of the legislative districts.[3] The formula was employed without any statistical study or inquiry to determine whether the formulaic determinations of precinct (and hence district) populations in any way approximated the actual populations of the precincts or districts.

2. Several lawsuits were filed challenging the reapportionment plans. The challenges of the various groups of plaintiffs were based on the equal protection clause of the fourteenth amendment, the fifteenth amendment, and section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. The several complaints alleged that the reapportionment

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[2]The formula, as set forth in the reapportionment acts, is as follows:

$$\frac{\text{County Population According to the Last Official United States Census}}{\text{Total Votes Cast in the County in the Most Recent General Election}} \times \text{Total Votes Cast in Each Precinct in the Most Recent General Election} = \text{Derived Precinct Population}$$

[3]The formulaic estimates of district populations derived from the votes-cast formula are not uniformly applied throughout New Mexico. Some legislative district populations are determined not by use of the votes-cast formula, but directly from U.S. Census Bureau counts. Thus, Senate District 7 is comprised wholly of Colfax, Union, Harding, and Quay Counties. As such, the votes-cast formula estimates of precinct populations are not used in this district and the population of the district is determined by reference to the total populations of the counties as reported by the census. In Senate District 6, however, the population of the district is determined by use of the votes-cast estimates. Therefore, in comparing the populations of Senate Districts 6 and 7 to determine if they are nearly equal in population, the 1982 reapportionment plans are comparing one district's total population as reported by the census against another district's population as determined by the votes-cast formula.

plans were racially discriminatory and failed to establish population equality among legislative districts. Subsequently, the United States of America intervened as a plaintiff through the Civil Rights Division of the Department of Justice.

3. Pursuant to 28 U.S.C. § 2284, a three-judge district court was convoked and the several lawsuits were consolidated for trial. The district court informed all parties that trial would be limited to the issue of the constitutionality of the reapportionment plans under the one-person, one-vote principles of the fourteenth amendment, and that all other issues were reserved. After extensive pre-trial discovery and the submission of pre-trial briefs by all parties, a four-day trial was held on March 22-25, 1982. Testimony was taken from twelve live witnesses, totaling in excess of 1,000 pages of transcript. In addition, the depositions of three more witnesses were introduced into the record, and several hundred exhibits, comprising thousands of pages, were also introduced.

4. On April 5, 1982, the district court entered a preliminary injunction, enjoining the Secretary of State from enforcing the April 6, 1982, filing deadline for candidates for the state legislature under the challenged reapportionment plans. The district court specifically found that the votes-cast formula was an inaccurate predictor of population[4] and further found that the inaccuracies in population estimates derived from the formula produced "deviations [from ideal] populations

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[4]The district court stated: "The record demonstrates that the application of the 'votes-cast formula' for ascertaining precinct population causes substantial variations between the presumed precinct populations for reapportionment purposes and actual precinct populations as determined from United States Census data." J.S. at A-2.

which . . . appear to exceed any which have heretofore passed constitutional scrutiny." J.S. App. at A-2. On April 8, 1982, the district court entered a Memorandum Opinion and Order finally adjudging the reapportionment plans unconstitutional. The court reaffirmed its finding that the votes-cast formula was an inaccurate predictor of district population and found that the districts created under the reapportionment plans deviated from the ideal population by 94% and 83%, respectively, for the House and Senate. J.S. App. at B-2.

The district court declined to create new reapportionment plans, but rather afforded to "the New Mexico Legislature an adequate opportunity to reapportion itself. The Legislature must make an honest and good faith effort to construct the legislative districts as nearly of equal population as is practicable." J.S. App. at B-3. The district court specifically recognized the difficulty caused by the fact that official census counts were taken from geographical units not coincident with precinct boundaries. *Id.* The court went on to state: "However, we do not attempt to instruct the Legislature on the method to employ in again attempting reapportionment. What we do require is that the Legislature employ a good-faith effort to construct legislative districts on the basis of actual population." J.S. App. at B-3 - B-4.[5]

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[5]The effect of the April 5 and 8, 1982, orders was to enjoin the June 1, 1982, New Mexico primary for legislative offices. Curiously, subsequent to the entry of the April 8, 1982, orders the defendants moved the district court to enjoin the defendants from holding the June 1, 1982, primary for other statewide, congressional and county offices. On April 13, 1982, over the objections of the Vargas plaintiffs, the district court entered such an order. Within days, a number of candidates for nonlegislative offices, whose primary elections had been postponed were permitted to intervene. When the district court denied intervenors' motion to reconsider the April 13, 1982, order several intervenors appealed to this Court and moved for a stay of the April 13, 1982, order of the district court. On April 23, 1982, this Court entered an order staying the April 13, 1982, order of the

ARGUMENT

The judgment of the district court should be affirmed for two independent reasons. First, the appellants' characterizations of both the district court's decisions and the record below are so extravagant as to make hypothetical both the issue presented by their Jurisdictional Statement and appellants' arguments. Second, once cast correctly, the district court's decisions are not only consistent with this Court's decisions, but mandated by them. Indeed, the deviations from population equality contained in the New Mexico legislative reapportionment plans at issue are so great that, to appellees' knowledge, this Court has not been presented with deviations of this magnitude for nearly a decade.

I.

APPELLANTS MISCHARACTERIZE THE DECISIONS OF THE DISTRICT COURT, AND APPELLANTS' ARGUMENTS RELY ON FACTS NOT CONTAINED IN THE RECORD. AS A CONSEQUENCE, THE QUESTION PRESENTED BY APPELLANTS IN THEIR JURISDICTIONAL STATEMENT IS HYPOTHETICAL AND INCAPABLE OF RESOLUTION ON THE RECORD.

The question presented by appellants' Jurisdictional Statement characterizes the district court's decisions below as requiring that "legislative apportionment must be based exclusively on raw population census figures." Nowhere in their Jurisdictional Statement do appellants

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district court to the extent that it postponed the June 1, 1982, primary as to non-legislative offices. This Court explicitly left undisturbed the district court's April 5 and 8, 1982, orders enjoining the June 1, 1982, primary as to state legislative offices. *Bingaman v. King*, No. A-889 (O.T. 1981), 50 U.S.L.W. 3857 (U.S. April 23, 1982).

explain what they mean by "raw population census figures." More important, at no time did the district court require the State of New Mexico to reapportion on the basis of "raw population census figures," whatever that may mean.

In its April 8, 1982, decision, the district court specifically and explicitly refrained from dictating to the legislature what method or what data were to be used in reapportionment: "However, we do not attempt to instruct the legislature on the method to employ in again attempting reapportionment." J.S. App. at B-3 - B-4. Moreover, the district court did not require that reapportionment be based on official census counts of population. The court explicitly qualified that "*if* census figures are to be used, it is necessary to allocate population figures from the census areas to the precincts to obtain a precinct count." J.S. App. at B-3 (emphasis added).

As can be seen, far from requiring that "raw population census figures" be used in reapportionment, the district court left plenary authority to the legislature as to both the method and data to be used in reapportionment.[6] Indeed, all that the district court required is that reapportionment be based on "actual population," J.S. App. at B-4, and that the districts be "nearly of equal population as is practicable." J.S. App. at B-3. As discussed in part II, *infra*, both of these requirements are

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[6]The options open to the State of New Mexico as alternatives to the use of official census data were many. Thus the state could have used census data for some areas and could have conducted its own count for other areas where the state determined the official census count to be inaccurate or too difficult to convert. Alternatively, there were populations counts other than the decennial census available to the state, at least for certain areas. Thus, there were BIA counts of Indians residing on the numerous Indian lands in New Mexico.

firmly founded in the one-person, one-vote jurisprudence and this Court's decisions.

The appellants' mischaracterization of the district court's decisions does not end with their question presented. In their first argument, appellants characterize the district court as engaging in a "per se rejection" of the votes-cast formula. To the contrary, the district court's April 8, 1982, decision reveals that the court considered the state's advanced justifications for use of the votes-cast formula and found those justifications wanting under this Court's prior decisions.[7] The court expressly recognized that there may be occasions when deviation from a total population basis for reapportionment is warranted or where "consideration of factors other than population" is appropriate. The district court found, however, that the circumstances necessary to support such justifications were not proved in this case. J.S. App. at B-2.

Appellants further erroneously assert that the district court required that reapportionment be based on "total population data," "to the exclusion of any other legitimate population basis." J.S. at 8. As described above,

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[7]The district court stated:

> The recitations in each of the Acts as to their reasons and purposes cannot be regarded as ground for an exception to a reliance on population figures. "Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." *Reynolds v. Sims*, 377 U.S. 533, 567 (1964). Use of a registered voter or actual voter basis in reapportionment can be sustained only when it produces "a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." *Burns v. Richardson*, 384 U.S. 73, 93 (1966). And while a state can justify the consideration of factors other than population by showing that those considerations further a rational state policy, those factors "cannot constitutionally be permitted to emasculate the goal of substantial equality." *Mahan v. Howell*, 410 U.S. 315, 326 (1973). J.S. App. at B-2.

the district court expressly recognized that a population base other than total population (i.e., voting-age population) may be permissible, but only under certain circumstances, as established by this Court in *Burns v. Richardson*, 384 U.S. 73 (1966). Quite simply, the district court held that those circumstances had not been established in this case. Finally, far from requiring New Mexico to employ "raw census data," as appellants repeatedly assert, the district court recognized that "*if* census figures are to be used," extrapolation from and refinement of the official census counts would be necessary. J.S. App. at B-3 (emphasis added).

Appellants' characterization of the district court's decisions below is not borne out by the court's opinions. What the district court did decide is that reapportionment must be population-based and that the votes-cast formula is a grossly and systematically erroneous predictor of precinct and district population. The court found that as a consequence of the use of the votes-cast formula, population equality requirements for reapportionment were not met and the deviations from ideal district populations exceeded 90% in the House and 80% in the Senate. As may be seen, therefore, the appellants' suggestions that the district court predicated its decisions on the assumptions that (1) official census data had to be used, (2) the census data had to be used in a "raw population" form, (3) total population was the exclusive basis for reapportionment, and (4) a per se approach was employed by the district court are all erroneous. As a consequence, both the question presented in appellants' Jurisdictional Statement and appellants' argument addressed to that question are irrelevant to what was decided below.

Moreover, appellants' arguments are predicated on

factual assertions which are not borne out by the record below. Appellants base their arguments on two salient "facts." First, appellants assert that there are "substantial concentrations of transients, aliens and other ineligible residents within [New Mexico's] total population," J.S. at 2, and that these ineligibles are concentrated geographically in "pockets." J.S. at 7. Contrary to appellants' assertions, the record fails to disclose either the extent of the presence in New Mexico of aliens, transients, or other "ineligibles," or the demographic residential patterns of whatever "ineligibles" there are in New Mexico. In short, this Court will be unable to determine from the record how many "ineligibles" reside in New Mexico and where they reside.

Second, appellants' argument is predicated on the factual assertion that the votes-cast formula distributes these ineligibles "in such a way as not to overly dilute a given election district," J.S. at 13, and thereby achieves "a more accurate estimate of citizen population." J.S. at 11. Not only are these "factual" assertions unsupported by the record below, but they are directly contrary to the testimony of even the appellants' witnesses. Clay Buchanan, the director of the New Mexico Legislative Council Service and one of appellants' chief witnesses at trial, testified that the formula was not intended to estimate total populations of precincts or any subgroup of total population. Tr. 791-92 (*see* Appendix A). Indeed, Mr. Buchanan candidly admitted that the formula arrives at an "artificial figure" for the population of any given precinct, Tr. 787-88 (*see* Appendix A), and referred to the population figures derived from the formula as "phony populations." Tr. 710 (*see* Appendix A). In light of this evidence, it is no wonder that the district court held that reapportionment based on "phony popu-

lations" derived from the formula did not constitute a population-based reapportionment as required by this Court. *See Reynolds v. Sims*, 377 U.S. 537, 567 (1964).

Contrary to appellants' assertions, the votes-cast formula is not designed to estimate accurately either total population or any subgroup of population. Moreover, the fact that the formula is a grossly and systematically inaccurate predictor of population is uncontradicted in the record below and is not challenged by appellants in their Jurisdictional Statement. Nowhere in the Jurisdictional Statement do appellants challenge the salient fact found by the district court—that the legislative districts created by the reapportionment plans contain maximum deviations from population ideals in excess of 90% in the House plan and 80% in the Senate plan.[8] Appellants seek to avoid this constitutionally fatal defect in the reapportionment plans at issue by seeking to turn this Court's attention to hypothetical issues, irrelevant to the decisions below and incapable of resolution on this record. The decision of the district court should be affirmed.

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[8]Appellants' reference in their Jurisdictional Statement that the legislative reapportionment plans at issue contained deviations from population ideals slightly less than 10%, J.S. at 4, is not a challenge to the district court's factual finding. Rather, appellants' statement of deviations contained in the plans refers to the "phony" population estimates created by the votes-cast formula. The district court found, however, that with reference to actual population, the deviations were in excess of 90% for the House plan and 80% for the Senate plan. This finding is not challenged by appellants.

II.

THE DISTRICT COURT CORRECTLY HELD THE 1982 REAPPORTIONMENT PLANS UNCONSTITUTIONAL, IN THAT THE ACTUAL POPULATIONS OF THE VARIOUS LEGISLATIVE DISTRICTS UNDER THE JANUARY 1982 REAPPORTIONMENT PLANS WERE GROSSLY AND UNCONSTITUTIONALLY MALAPPORTIONED.

States in reapportioning their legislatures must ensure "that legislative districts be of nearly equal population, so that each person's vote may be given equal weight in the election of representatives." *Connor v. Finch*, 431 U.S. 407, 416 (1977). In January 1982, the New Mexico legislature met in special session to reapportion itself. The reapportionment plans which were enacted purported to create "districts of equal populations," 1982 N.M. Laws, chapters 1 and 2, thereby purportedly affording to New Mexico citizens the rights guaranteed by *Reynolds v. Sims*, 377 U.S. 533 (1964), and its progeny. Notwithstanding the illusion these reapportionment plans sought to create, they fell far short of creating districts of nearly equal population; therefore, they do not satisfy the requirements of the fourteenth amendment.

A. The Fourteenth Amendment Requires That Legislative Districts Be of Nearly Equal Population.

The mandate of *Reynolds v. Sims*, 377 U.S. 533 (1964), with regard to apportionment of state legislatures has been refined into what is now essentially a three-tiered review of deviations from population equality. First, the Court has considered under 10% deviations to be of "prima facie constitutional validity." *Connor v. Finch*, 431 U.S. at 418; *see Gaffney v. Cummings*, 412 U.S. 735

(1973) (7.83% maximum deviation from the ideal); *White v. Regester*, 412 U.S. 755 (1973) (9.9% maximum deviation from the ideal).[9]

Second, deviations of greater magnitude may be justified only if "based on legitimate considerations incident to the effectuation of a rational state policy." *Mahan v. Howell*, 410 U.S. 315, 325 (1973) (quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964)); *see also Abate v. Mundt*, 403 U.S. 182 (1971) (11.9% maximum deviation permitted with justification). *Mahan* represents the greatest deviation yet tolerated by the Court. There, a 16.4% maximum deviation in state legislative reapportionment was upheld because the goal of maintaining cities and counties as legislative districts was furthered by the legislature's reapportionment plan.

Finally, even where there is such justification, the divergences must be within tolerable limits, for a "State's policy urged in justification of disparity in district population, however rational, cannot connstitutionally be permitted to emasculate the goal of substantial equality." *Mahan v. Howell*, 410 U.S. at 326. Thus, at the third tier the Court has rejected a 26% maximum deviation. *Swann v. Adams*, 385 U.S. 440 (1967); *see also Whitcomb v. Chavis*, 403 U.S. 124 (1971) (24.7% maximum deviation in the House found unconstitutional). As the Court stated in *Mahan*, 16.4% deviations "may well approach the tolerable limits." 410 U.S. at 329. Indeed, the lower federal courts have viewed 16.4% as the extreme limit of

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[9]Maximum deviations of less than 10% are not, however, a talisman. Courts routinely consider not only maximum deviations, but also average deviations, and the incidence of deviation, in determining whether the constitutional mandate of population equality has been met. *See e.g., Connor v. Finch*, 431 U.S. 407, 416-17 (1977).

justifiable deviation from equality. *See Panior v. Iberville Parish School Board*, 498 F.2d 1232, 1236 (5th Cir. 1974); *Graves v. Barnes*, 446 F. Supp. 560 (W.D. Tex. 1977).

B. The January 1982 Reapportionment Plans Create Population Deviations Greatly in Excess of Permissible Limits.

The record below establishes without contradiction that the votes-cast formula as applied in the January 1982 reapportionment plans systematically caused widespread and gross deviations from actual population. The trial court found maximum deviations of 94% in the state House plan and 83% in the Senate plan. *See* J.S. App. at B-2. In addition, the record discloses further uncontroverted evidence that in the House, District 13 in Bernalillo County had 29,912 actual population while District 47 in Santa Fe County had 12,402 actual inhabitants—well over a two-to-one ratio in maximum deviation from the ideal of 18,613. Plaintiffs' Exhibits 105, 114 (*see* Appendix B). Under the January 1982 House reapportionment plan, there was an average deviation of 18% from the ideal population. *Id.* Forty-three of the seventy House districts deviated by more than 10%, at least thirty-one districts deviated by more than 15%, and at least twenty-seven districts deviated by more than 20%. *Id.*

With respect to the Senate reapportionment plan, it is also uncontradicted that Senate District 11 in Bernalillo County was the most overpopulated, with 43,977 inhabitants, while District 16 in Bernalillo County, at the other extreme, had only 18,180 actual population, almost a 2.5-to-1 ratio in maximum deviation from the ideal of 31,021. Plaintiffs' Exhibit 115 (*see* Appendix B). In addition, under the January 1982 Senate reapportionment plan, there was an average deviation of 12.3% from ideal popu-

lation. Plaintiffs' Exhibits 106, 115 (*see* Appendix B). At least seventeen of the forty-two Senate districts deviated from the ideal population by 10% or more, and at least eleven districts deviated by 15% or more. *Id.*

Such massive deviations from population equality far exceed the maximum of 16.4% tolerated by the Court in *Mahan*, and greatly exceed the 26% maximum deviation found to violate equal protection in *Swann*. Indeed, the maximum deviations in the present case substantially exceed even those rejected by the Court in the earliest reapportionment cases, companions to *Reynolds v. Sims*, 377 U.S. 533 (1964). *See WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 645 (1964) (ratios of 1.7 to 1 between the most and least populous state senate districts found unconstitutional); *Lucas v. Colorado General Assembly*, 377 U.S. 713, 727 (1964) (ratios of 1.7 to 1 in the house rejected).

These massive, widespread, and unprecedented deviations defy justification by any state policy. As the district court correctly held, they come within that third tier of cases where the deviation would "emasculate the goal of substantial equality." *Mahan v. Howell*, 410 U.S. 315, 326 (1973). They are well beyond the tole able limits of divergence from equality which can be justified.

C. The January 1982 Reapportionment Plans, in Basing Reapportionment on Artificial Population Figures As Derived by the Votes-Cast Formula, Are Not a Population-Based Reapportionment Within the Meaning of the One-Person, One-Vote Formulation Under the Fourteenth Amendment.

Reapportionment must be population-based. Since this Court's decisions nearly twenty years ago in *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533

(1964), it is clear that the heart of the inquiry in determining whether a reapportionment plan satisfies the fourteenth amendment is whether the legislative districts are of equal populations. As the Court articulated this principle in *Reynolds v. Sims*, 377 U.S. at 577:

> By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.

Clearly, then, in order to make the constitutional determination whether legislative districts are "as nearly of equal population as is practicable," reference must be made to some reasonably accurate figures of some actual population in the districts. Recognition of this principle lies at the very heart of the district court's constitutional invalidation of the January 1982 reapportionments plans.

In its Memorandum Opinion and Order of April 8, 1982, J.S. App. at B-1 - B-4, the district court concluded that "the application of the formula . . . causes substantial variations between the numbers thereby derived and United States Census figures." *Id.* at B-2. Ultimately, while the district court did "not attempt to instruct the Legislature on the method to employ in again attempting reapportionment," it rejected a formulaic approach and required the construction of legislative districts on the basis of "actual population." *Id.* at B-3 - B-4.

Virtually every witness who addressed the purpose or effect of the votes-cast formula testified that the formula did not accurately estimate the total populations of precincts and districts or any subgroup of total population.

On this record, the votes-cast formula and the reapportionment premised on it cannot withstand the "careful judicial scrutiny [which] must . . . be given, in evaluating state apportionment schemes, to the *character* as well as the degree of deviations from a strict population basis." *Reynolds v. Sims*, 377 U.S. at 581 (emphasis added). Appellees respectfully suggest that, as the district court held below, a reapportionment plan based on "artificial" or "phony" population figures simply cannot be the population-based reapportionment demanded by the equal protection clause of the fourteenth amendment.

D. Appellants Have Failed to Justify the Gross Deviations Demonstrated on This Record or to Establish the Special Circumstances Which Could Warrant the Utilization of a Population Base Other Than Total Population. As Such, the 1982 Reapportionment Plans Fail to Satisfy the One-Person, One-Vote Requirement of the Fourteenth Amendment.

Appellees have argued in part II(C) that the district court properly found that the New Mexico reapportionment plans based on the votes-cast formula were not a population-based reapportionment within the meaning of one-person, one-vote. Even if it were assumed that the plans were population-based, it is clear that the population upon which the 1982 plans base reapportionment is not total population, but some more narrow subgroup of population. The record fails to establish the special circumstances and requirements necessary to justify a population base for reapportionment other than total population. Moreover, the district court properly found no such special circumstances or justification in the record below.

In light of the massive and widespread population

deviations caused by the formula, the district court found no justification "for an exception to a reliance on population figures" See J.S. App. at B-2. The court further indicated that the requirements of *Burns v. Richardson* had not been met for "[u]se of a registered voter or actual voter basis in reapportionment." *Id.*

In its Memorandum Opinion and Order of April 8, 1982, the district court observed an appropriate deference to legislative judgment in reapportionment. However, citing *Mahan v. Howell*, 410 U.S. 315, 326 (1973), the court stated that "consideration of factors other than population . . . 'cannot constitutionally be permitted to emasculate the goal of substantial equality.'" *Id.*

On the record established below, appellants can find no comfort in *Burns v. Richardson*, 384 U.S. 73 (1966), or the dicta in *Gaffney v. Cummings*, 412 U.S. 735, 746-49 (1973), upon which they expressed reliance in their Jurisdictional Statement. In *Burns*, this Court approved, in very narrow circumstances, elimination of certain groups from the population base for reapportionment, in that case military residents and tourists. However, the votes-cast formula does not eliminate groups from the population base, but rather seeks to rearrange, redistribute or spread around some unidentifiable group in an undefinable way. There is absolutely nothing in the holding or reasoning of *Burns* which supports undefined rearrangement of population groups.

Even if the formula did seek to estimate a more narrow population base, it is clear that the special circumstances required by *Burns* are not established by this record. As a threshold inquiry, *Burns* required that before a population base more narrow than total population could

be employed, the state must establish "special population problems." In *Burns*, Hawaii established not only that the state hosted an unusually large number of military residents and transient tourists, but also that these groups (tourists and military) were not spread relatively evenly throughout the state, but were concentrated disproportionately on the Island of Oahu. Given Hawaii's unique districting plan at the time, 384 U.S. at 77, it is clear that it was not only the existence of these groups but also their maldistribution which the Court was focusing on as creating the "special population problems" necessary to depart from a population base of total population.

Appellants have failed to establish any "special population problems" as required by *Burns*. Certainly, the facts that (1) the census data include ineligibles; (2) the census data contain some inaccuracies; and (3) the census data are reported for geographic areas not coincidental to precincts cannot be sufficient to establish "special population problems," since these characteristics of the census data arise in nearly every state. Nor can appellants rely on any special problems arising from illegal aliens. First, no statistically reliable figure for the number of illegal aliens in New Mexico was introduced into evidence below. Second, and more important, there was absolutely no evidence where these illegal aliens resided in the state or that they were disproportionately concentrated in *identifiable* areas, as was the case in Hawaii. Finally, there was no evidence concerning what the votes-cast formula actually does with these illegal aliens; nor is any such evidence suggested in appellants' Jurisdictional Statement.

The second special circumstance required by *Burns* is equally lacking in this case. *Burns* required that if estimates of population were employed, it must be estab-

lished that the estimates were reasonably accurate indicators of some permissible population base. 384 U.S. at 94-95. In *Burns*, the Supreme Court approved citizens as a constitutionally permissible population base and held that it was adequately established that the "distribution of registered voters approximates distribution of state citizens." 384 U.S. at 95. This circumstance was not established by the record in this case. Appellants came forward with no studies to establish that the votes-cast formula estimates with reasonable accuracy any permissible population base.

Finally, *Burns* indicates that departure from a total population base would not be approved if the effect were to have an adverse impact on minorities by perpetuating "underrepresentation of groups constitutionally entitled to participate in the electoral process." 384 U.S. at 92-93. The record in this case amply establishes that the votes-cast formula systematically creates an adverse impact on minorities. It is clear from the record that none of the special circumstances required by *Burns* was present in this case.

CONCLUSION

For the above reasons, appellees respectfully move the Court to affirm the judgment of the district court below.

Respectfully submitted,

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Appendix A

TESTIMONY OF CLAY BUCHANAN

Tr. 710 (emphasis added)

Q. Would you please explain how you view the formula and its effect?

A. The formula was a pragmatic, political attempt based on the suggestion by the judge in the original case, in New Mexico, to follow his direction. In other words, the census division that we had, that we could rely upon that didn't mess up our precincts, was the county. And so our office, without any specific direction from the legislature, in other words, they said draft a big bill, wrote up that language.

We used estimated population simply because we didn't know what else to call it. One hardly passed a bill saying phony population. We used estimate population because it is a term they understood. It does, as a matter of checking out the plans, add up to county and state totals of the gross, or the raw census population, and one of the problems in drafting the bill is that you must have a way to proofread it, not just as you proofread something you dictate to see it it reads, but to see that all areas are in, and that it adds up.

If those figures don't add up, then you know you have left something out or you put something in twice or something.

Tr. 787-88

Q. (Mr. Goldberg, continuing.) Would you explain to me, again, what is it that the votes cast formula then is intended to do?

A. The votes cast formula, when originally enacted, was intended to comply with Judge Caswell Neal's suggestion. In rough theory, the concept was it is a raw census body count, the total county population, redistributed within the precincts, not literally, but figuratively, redistributed

within the precincts according to the number of votes cast in that precinct in the last general election.

As originally enacted, I do not think that anybody was trying to do anything but come up with a figure, an artificial figure that the legislature could use to break up counties.

Q. But —

A. I think that was the intent at that time.

Q. The artificial figure that you refer to, that is, the — what is now called the derived population?

A. Yes, sir.

Q. And in previous forms, it has been called the estimated precinct population?

A. Yes, sir.

Q. It is the precincts, though, that are the building blocks of the legislative districts?

A. Yes.

Q. So is it your testimony that the legislative districts are built on artificial figures?

A. Artificial figures that bear a relationship to total county population.

Tr. 791-92

My question is, is the votes cast formula intended to estimate a subgroup of the total population within a given geographic area?

A. No, it is not. No.

Q. So it is not intended. So the figure that is given and that figure that is used as part of the building block for an elective district, is not intended to estimate any subgroup of the population in that geographic area?

A. Of the population, no.

Q. Of any subgroup of that population?

A. I'm not trying to evade the question, what does "subgroup" mean?

Q. Is eighteen and over, registered voters, people who go into the voting booth; people who show up at the lines, but don't vote, sixty-five and over; people who have sandboxes in their backyard, any subgroup that you wanted to find, that's what I'm asking you.

JUDGE SETH: Well, it's your question, counsel, but give him a little guidance of what you mean.

Q. (Mr. Goldberg, continuing.) Does it seek to identify registered voters and estimate who are the registered voters and how many live in that precinct?

A. No.

Q. Does it seek to identify an estimate of people who are eighteen and over?

A. No, it does not.

Q. And does it seek to estimate and identify people who go into the polling booths and cast ballots?

A. No.

Q. Does it seek to estimate — identify and estimate people who are qualified to vote, but may or may not register to vote?

A. No.

Q. Does it seek to identify and estimate any other identifiable group of population within that precinct, that you can think of?

A. No. I think it seeks to eliminate.

Appendix B

Plaintiffs' Exhibit 105

HOUSE DISTRICTS
(Chaves, Cibola, Curry, DeBaca, Dona Ana, Eddy, Harding, Lea, Otero, Quay, Roosevelt, Valencia)

(Ideal: 18,613)

District	Location	Derived Pop. (Votes-Cast Formula)	Total Pop. 1980 Census	% Deviation from Ideal
7	Cibola	18,952	15,439	−17.1
8	Valencia	19,341	19,017	+ 2.2
10	Cibola and	19,102	23,335	+25.4
33	Dona Ana	18,259	14,161	+23.9
34	Dona Ana	18,426	26,403	+41.9
35	Dona Ana	18,364	16,347	−12.2
36	Dona Ana	18,200	16,849	− 9.5
37	Dona Ana	18,408	13,872	+25.5
45	Santa Fe	18,306	23,334	+25.4
46	Santa Fe	17,797	18,284	− 1.8
47	Santa Fe	17,703	12,402	−33.4
48	Santa Fe	17,752	15,239	−18.1
50	Torrance, Valencia, Bernalillo	19,076	20,074	+ 7.8
51	Otero	18,855	29,699	+59.55
52	Otero	18,510	15,341	−17.58
53	Otero	17,771	13,829	−25.7
54	Eddy	18,423	20,528	+10.29
55	Eddy	18,631	15,945	−14.33
56	Eddy	19,334	19,949	+ 7.18
57	DeBaca and Chaves	18,647	18,071	− 2.9
58	Chaves	17,741	18,715	+ .6
59	Chaves	17,890	17,585	− 5.5
60	Lea	18,601	18,825	+ 1.1
61	Lea	18,337	22,940	+23.2

District	Location	Derived Pop. (Votes-Cast Formula)	Total Pop. 1980 Census	% Deviation from Ideal
62	Lea	19,055	14,228	−23.6
63	Curry	19,409	24,488	+31.6
64	Curry	18,483	14,367	−22.8
66	Curry and Roosevelt	18,284	18,055	− 3.
67	Curry, Union	17,930	17,196	− 7.6

Summary

House Districts (Other Counties):

18 districts with a deviation of 10% or greater
15 districts with a deviation of 15% or greater
12 districts with a deviation of 20% or greater

Maximum Deviation: 92.95%

Plaintiffs' Exhibit 114

HOUSE DISTRICTS
(San Juan, McKinley, Bernalillo)

(Ideal. 18,613)

District	Location	Derived Pop. (Votes-Cast Formula)	Total Pop. 1980 Census	% Deviation from Ideal
1	San Juan	18,859	14,809	−20.44
2	San Juan	18,307	16,770	− 9.90
3	San Juan	18,403	18,552	− 0.33
4	San Juan	18,613	22,536	+21.08
5	McKinley	19,157	14,279	−23.28
6	McKinley	18,823	21,171	+13.74
9	San Juan and McKinley	18,030	21,370	+14.81
11	Bernalillo	19,493	23,173	+25.
12	Bernalillo	18,028	24,725	+33.
13	Bernalillo	19,270	29,912	+61.
14	Bernalillo and Valencia	19,267	24,298	+22.
15	Bernalillo	18,953	18,598	0.
16	Bernalillo	18,904	20,801	+12.
17	Bernalillo	17,871	16,537	−12.5
18	Bernalillo	17,721	14,800	−21.
19	Bernalillo	18,765	16,498	−11.
20	Bernalillo	19,324	28,270	+52.
21	Bernalillo	19,355	22,271	+20.
22	Bernalillo	18,921	13,698	−26.
23	Bernalillo	19,257	13,383	−28.
24	Bernalillo	19,012	15,172	−22.6
25	Bernalillo	19,309	16,120	−13.
26	Bernalillo	19,120	14,440	−22.
27	Bernalillo	18,196	17,041	− 9.
28	Bernalillo	18,961	16,683	−10.
29	Bernalillo	18,726	19,430	+ 5.

District	Location	Derived Pop. (Votes-Cast Formula)	Total Pop. 1980 Census	% Deviation from Ideal
30	Bernalillo	18,954	13,140	−29.
31	Bernalillo	18,354	15,574	−16.
69	Bernalillo	18,300	19,376	+ 4.

Summary

House Districts (San Juan, McKinley, Bernalillo):

23 districts with a deviation of 10% or greater
16 districts with a deviation of 15% or greater
15 districts with a deviation of 20% or greater

Maximum Deviation: 90%

Plaintiffs' Exhibit 106

SENATE DISTRICTS
(Chaves, Curry, Dona Ana, Eddy, Lea
Otero, Rio Arriba, Santa Fe)

(Ideal: 31,021)

District	Location	Derived Pop. (Votes-Cast Formula)	Total Pop. 1980 Census	% Deviation from Ideal
5	Rio Arriba and	32,244	32,548	+ 4.9
24	Santa Fe	31,494	34,324	+10.6
25	Santa Fe	32,036	25,410	−18.1
27	Curry	30,668	30,910	− .4
32	Chaves	30,629	29,617	− 4.5
33	Eddy and Chaves	31,540	33,800	+ 8.96
34	Eddy	30,023	29,050	− 6.35
36	Dona Ana	32,336	31,981	+ 3.1
37	Dona Ana	31,903	27,719	−10.6
38	Dona Ana	32,101	36,640	+18.1
40	Otero	30,819	33,920	+ 9.35
41	Lea	29,477	31,290	+ .9

Summary

Senate District (Other Counties):

4 districts with a deviation of 10% or greater

2 districts with a deviation of 15% or greater

Maximum Deviation: 36.2%

Plaintiffs' Exhibit 115

SENATE DISTRICTS
(San Juan, McKinley, Bernalillo)

(Ideal: 31,021)

District	Location	Derived Pop. (Votes Cast Formula)	Total Pop. 1980 Census	% Deviation from Ideal
1	San Juan	32,477	26,752	−13.76
2	San Juan	31,589	33,959	+ 9.47
3	San Juan and McKinley	30,883	34,668	+11.76
4	McKinley	32,111	30,913	− 0.35
10	Bernalillo	31,067	31,142	+ 0.39
11	Bernalillo	29,834	43,977	+42.
12	Bernalillo	30,184	36,525	+18.
13	Bernalillo	30,335	31,945	+ 2.9
14	Bernalillo	30,074	36,507	+18.
15	Bernalillo	29,698	27,269	−13.
16	Bernalillo	30,098	18,180	−41.
17	Bernalillo	30,118	37,612	+21.
18	Bernalillo	31,855	25,776	−17.
19	Bernalillo	31,904	35,590	+15.
20	Bernalillo	30,378	22,038	−29.
21	Bernalillo	31,646	27,704	−11.9
22	Bernalillo	30,089	25,469	−18.

Summary

Senate Districts (San Juan, McKinley, Bernalillo):
13 districts with a deviation of 10% or greater
9 districts with a deviation of 15% or greater

Maximum Deviation: 83%

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No. 81-2385

In the Supreme Court of the United States

OCTOBER TERM, 1982

BRUCE KING, GOVERNOR OF THE STATE OF NEW MEXICO, ET AL., APPELLANTS

v.

FRANK I. SANCHEZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MOTION TO AFFIRM

REX E. LEE
Solicitor General

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QUESTION PRESENTED

Whether the 1982 reapportionment of the New Mexico legislature, which employs a formula based on a combination of population and actual votes cast in the last general election and which results in districts with substantial population deviations, violates the "one-person, one-vote" principle in the Equal Protection Clause of the Fourteenth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2385

BRUCE KING, GOVERNOR OF THE STATE OF NEW MEXICO, ET AL., APPELLANTS

v.

FRANK I. SANCHEZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MOTION TO AFFIRM

The Solicitor General, on behalf of the United States, moves, pursuant to Supreme Court Rule 16(1)(c), that the judgment of the district court in this case be affirmed.

OPINIONS BELOW

The April 8, 1982 memorandum opinion and order of the district court (J.S. App. B-1 to B-4) is not reported. The April 5, 1982 opinion of the district court granting a preliminary injunction (J.S. App. A-1 to A-3) is also unreported.

JURISDICTION

The order of the district court (J.S. App. B-1 to B-4) was entered on April 8, 1982. The notice of appeal (J.S. App. C-1 to C-2) was filed on April 29, 1982. The appeal was docketed on June 28, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

1. These consolidated suits, which were filed in the United States District Court for the District of New Mexico by voters in New Mexico against the Governor and Secretary of State, challenge the constitutionality of the 1982 reapportionment of both the State's Senate and House of Representatives. The complaints alleged that the reapportionment violated the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment, 42 U.S.C. 1971(a)(1) and (2) and 1973, and various state statutes and constitutional provisions. A three-judge court was convened in accordance with 28 U.S.C. 2284. The United States was granted leave to intervene as a plaintiff, pursuant to Title IX of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2.[1]

Following a four-day trial, the three-judge court on April 5, 1982, entered a preliminary injunction postponing indefinitely the April 6, 1982, deadline for filing petitions of candidacy for the legislature (Pet. App. A-2 to A-3). On April 8, 1982, the court entered an order declaring the 1982 reapportionment unconstitutional as violating one-person, one-vote principles of the Equal Protection Clause of the Fourteenth Amendment (Pet. App. B-1 to B-4). The court therefore enjoined the primary election pending the adoption by the state legislature of a new reapportionment plan.[2]

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[1]In the district court, the United States alleged that the reapportionment plan intentionally abridged the voting rights of Indians and Hispanics in violation of the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. The trial in the district court was limited, however, to the Fourteenth Amendment Equal Protection claim.

[2]On April 13, 1982, appellants moved for a stay of the April 8 order pending appeal to this Court, or, in the alternative, for an injunction postponing indefinitely the June 1, 1982, primary election for all congressional, statewide and county offices. Appellants asserted that it

2. The 1982 House and Senate Reapportionment Acts of the 35th Legislature of the State of New Mexico provide the following formula for the purpose of allocating the State's population into the voting precincts which make up each legislative district:

$$\frac{\text{COUNTY POPULATION ACCORDING TO THE LAST OFFICIAL U.S. CENSUS}}{\text{TOTAL VOTE CAST IN THE COUNTY IN THE MOST RECENT GENERAL ELECTION}} \times \text{TOTAL VOTE CAST IN EACH PRECINCT IN THE MOST RECENT GENERAL ELECTION} = \text{DERIVED PRECINCT POPULATION}$$

The legislative "Findings of Fact" explain the State's decision to rely upon a formula emphasizing actual votes cast as opposed to using only general population data. They

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would cause "great[] disruption, inconvenience, increased cost, and confusion" to hold a June 1 primary for non-legislative candidates and a later primary for the state legislature. The district court, on the same day the motion was filed, denied the stay of its prior order, but granted appellants' alternative motion to stay the entire New Mexico primary scheduled for June 1. Candidates for non-legislative offices were permitted to intervene to seek reconsideration of that order. Following the district court's denial of their motions for reconsideration, these private intervenors sought a stay in this Court to permit the non-legislative primary elections to proceed. *Bingaman* v. *King*, No. A-889 (1981 Term). On April 23, 1982, this Court entered an order staying the district court's April 13 order to the extent that it applied to other than state legislative offices, pending the timely filing and disposition of an appeal. That appeal has since been voluntarily dismissed.

state that the population data supplied by the Bureau of the Census generally do not correspond with the State's election precincts, and that redefining precinct boundaries to make the census data useable "would not only entail significant administrative cost but could not be completed in time for the holding of the 1982 primary and general elections" (J.S. App. D-3 to D-4, E-3).[3] The legislature also cited "gross errors" in the census data that had been collected in New Mexico (J.S. App. D-3, E-3).

The legislature also found (J.S. App. D-3, E-3) that the presence in the State of large numbers of persons who are either ineligible to vote, or who vote outside the precinct where they reside, *e.g.*, institutionalized persons, illegal aliens, university students and residents of military bases, causes the use of census data as the sole method of apportionment to weigh votes unfairly in some precincts (*ibid.*). According to the "Findings of Fact," the legislature's formula, using votes cast and population "comes closest to the spirit embodied in the 'one-person, one-vote' concept in that it eliminates unequal weight given to the votes of persons resident within districts containing large numbers of persons not eligible to vote" (J.S. App. D-4, E-4).

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[3] In 1975, Congress passed a statute, Pub. L. No. 94-171, 89 Stat. 1023, requiring the Bureau of the Census to collect 1980 data on the basis of local boundaries, *e.g.*, voting precincts, if certain requirements were satisfied by the states, 13 U.S.C. 141(c). The Bureau published guidelines requiring jurisdictions participating in this program to present plans in which precinct boundaries "coincide with visible features readily distinguishable on the ground by a census enumerator * * *," 41 Fed. Reg. 13639 (1976). Additional alternatives made available to the states by the Census Bureau included options for states to assist the Bureau in defining enumeration districts and blocks, to purchase block figures for the entire state, and to purchase data from the Bureau splitting enumeration districts and blocks to match precinct boundaries. New Mexico chose not to participate in the Pub. L. No. 94-171 program or to exercise any of the other available options.

Appellees presented data from three experts to demonstrate the malapportionment caused by use of the legislature's formula. From the exhibits prepared by these three witnesses, 58 of the 70 House districts containing 82.7% of the State's population and 29 of the 42 Senate districts containing 69.25% of the State's population were analyzed.[4] A comparison in the 58 House districts between the calculated census population, created by the legislature's formula, and the ideal House district population (18,613)[5] produced an average deviation of 18.3% and a maximum deviation of 94% (J.S. App. B-2; Pl. Exhs. 5, 105, 114).[6] The same analysis performed for the Senate districts (ideal = 31,021) showed an average deviation of 13.13% and a maximum deviation of 83% (*ibid.*). For both House and Senate districts, the largest district is 2.4 times larger than the smallest district. Stated differently, for every 100 people in the smallest district, there are 240 in the largest district.[7]

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[4]Dennis Stoudt, Chief of the Special Projects Branch of the Bureau of the Census, and his staff, calculated the population of the precincts in San Juan and McKinley counties (Pl. Exh. 2). Dale Glass, Deputy Director of the Middle Rio Grande Council of Governments, calculated the population for precincts in Bernalillo County (Pl. Exh. 1). Dr. James O. Williams, an expert in demography and population studies, analyzed an additional 29 House and 12 Senate districts (Pl. Exhs. 105, 106).

[5]The ideal district population is calculated by dividing the total population of the state by the number of House or Senate seats.

[6]The average deviation is calculated by adding the deviations for all districts and dividing by the total number of districts. The maximum deviation is calculated by adding together the percentage deviation of the largest and smallest districts.

[7]The United States and private plaintiffs also presented evidence that the disparities caused by use of the vote cast formula are not random but are significantly correlated with ethnicity, *i.e.*, districts in which the Indian and Hispanic population is high were consistently underrepresented, while districts with low minority group populations were consistently overrepresented (Tr. 169). The district court did not reach the

3. The district court held that the use of the votes cast formula for apportionment of the New Mexico legislature is "constitutionally impermissible" (J.S. App. B-2). The court recognized that the use of registered or actual voters as a basis for apportionment is not per se unconstitutional, but concluded that such plans can be sustained only when they produce " 'a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis' " (J.S. App. B-2, quoting *Burns* v. *Richardson*, 384 U.S. 73, 93 (1966). Here the disparities between the two plans were sufficiently great that they "emasculate[d] the goal of substantial equality" (J.S. App. B-2, quoting *Mahan* v. *Howell*, 410 U.S. 315, 326 (1973)).

The district court recognized, however, that apportionment is primarily a legislative function, and therefore gave the legislature an opportunity to make a "good-faith effort to construct * * * legislative districts as nearly of equal population as is practicable" (J.S. App. B-3). While the court noted that no reason appeared why the State could not use the method employed by the Census Bureau to adapt census data to precinct boundaries, it explicitly disavowed any attempt to dictate to the legislature the method to be used in redrawing its plan (J.S. App. B-3 to B-4).[8]

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question whether the votes cast formula denied or abridged the voting rights of Indians and Hispanics.

[8]On June 28, 1982, the Governor of New Mexico, one of the appellants here, signed into law House Bill 3 redistricting the House of Representatives in response to the district court's order. On July 12, 1982, the United States moved for a preliminary injunction against implementation of House Bill 3 and sought a hearing in the district court on its claim that a number of districts in the new reapportionment violate Section 2 of the Voting Rights Act, 42 U.S.C. 1973, as amended by Pub. L. No. 97-205, Section 3, 96 Stat. 134, and the Fourteenth and Fifteenth Amendments. A hearing was held on August 4-6 and 12-13, 1982. No decision has as yet been rendered by the district court.

ARGUMENT

Appellants focus virtually their entire argument (J.S. 6-14) on a "straw man" issue, *viz.*, whether the Fourteenth Amendment requires a state legislature to rely exclusively upon population statistics in reapportioning legislative districts. No one, and specifically not the district court, disputes that total population statistics are an imperfect means of measuring compliance with the one person-one vote principle, see *Gaffney* v. *Cummings*, 412 U.S. 735, 746-747 (1973), and that therefore the states in appropriate circumstances may employ different data bases for apportioning their legislatures. *Burns* v. *Richardson*, 384 U.S. 73, 94-95 (1966) (registered voters); *WMCA, Inc.* v. *Lomenzo*, 382 U.S. 4 (1965) (citizens). Indeed, the district court expressly recognized this principle and, in light of it, made clear that it was not instructing the State regarding what method should be employed in redrawing its plan (J.S. App. B-3 to B-4).

What is at issue in this case is whether the district court must totally disregard a finding of severe malapportionment based on population solely because the State has decided to use some other formula to apportion its districts.[9] The district court properly interpreted this Court's

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[9]Appellants rely heavily upon this Court's discussion in *Gaffney* v. *Cummings*, 412 U.S. 735, 745-748 (1973), regarding the limits on the usefulness of total population statistics as a basis for apportionment. But appellants ignore the legal context in which that discussion arose. The Court was merely explaining why "minor deviations" (412 U.S. at 745) from equality among voting districts were insufficient to establish a prima facie case of discrimination. It was in no way suggesting that significant deviations (such as those involved in this case) in population among districts can be justified because population statistics are not perfect. The Court in *Gaffney* based its entire analysis on a reaffirmation of the requirement in *Reynolds* that districts be "as nearly of equal population as is practicable." *Gaffney* v. *Cummings, supra*, 412 U.S. at 742, quoting *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964). Thus, the decision of the district court is fully consistent with *Gaffney*.

prior decisions as requiring the state legislature when adopting an apportionment scheme to be more sensitive about variations in actual population between districts than it was in the 1982 Reapportionment Acts, and the district court's judgment therefore should be affirmed.

In explaining how the one-person, one-vote principle should be implemented, this Court stated in *Reynolds* v. *Sims*, 377 U.S. 533, 567 (1964) (emphasis added): "Population is, of necessity, the starting point for consideration and the *controlling criterion for judgment* in legislative apportionment controversies." Consistent with that guideline, this Court approved the use of registered voters as the basis for apportionment in *Burns* v. *Richardson, supra*, 384 U.S. at 93, "only because on [that] record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." See also *Ely* v. *Klahr*, 403 U.S. 108, 115-116 n.7 (1971).[10]

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[10]This Court recognized in *Burns* that use of a registered or actual voter base was fraught with a number of difficulties which called into question its appropriateness as an apportionment tool. *Burns* v. *Richardson, supra*, 384 U.S. at 92-93. Specifically, the Court noted that use of actual voter data, in contrast to eligible voter data, makes political activity the critical concern and, therefore, may "perpetuate under-representation of groups constitutionally entitled to participate in the electoral process" or "perpetuate a 'ghost of prior malapportionment.' " *Ibid.* Further, the Court recognized that registration and turnout are subject to "sudden and substantial" fluctuations caused by such factors as controversial issues, popularity of candidates, or inclement weather. *Id.* at 93, citing *Ellis* v. *Mayor of Baltimore*, 352 F. 2d 123, 130 (4th Cir. 1965). Finally, the Court noted that "registration figures derived from a single election are made controlling for as long as 10 years." 384 U.S. at 93. All of these factors were of concern to appellees in the court below because they worked a disproportionately adverse effect upon groups protected by the Fifteenth Amendment and by federal voting rights statutes.

Obviously, no similar conclusion can be drawn from the evidence in this case. When the districts created by the votes cast formula are compared on the basis of actual population figures, the deviations are striking. Thus, an apportionment based on population would be not at all comparable to that created by the votes cast formula, as required by *Burns*.

Indeed the deviations present in this case are as large as those involved in *Reynolds* v. *Sims, supra*, and its companion cases[11] and greater than those in any case presented to this Court since that time. While the Court has occasionally considered the question whether a particular numerical deviation was substantial enough to invalidate a plan and has cautioned that each case must be decided on its own facts rather than by using "specialized calipers" to measure the range of permissible mathematical deviations, the deviations here far exceed those said to "approach tolerable limits," *Mahan* v. *Howell*, 410 U.S. 315, 329 (1973).

Notwithstanding the severe malapportionment based on population, appellants argue (J.S. 12-14) that the situation is justified by the unique demographic problems in New Mexico. In this regard, we note that the Court in *Swann* v. *Adams*, 385 U.S. 440, 443-444 (1967), left open the possibility that deviations as high as 30% to 40% could be approved if the State were to provide a "satisfactory explanation grounded on acceptable state policy." See also *Mahan* v. *Howell, supra*, 410 U.S. at 328-329. But it is extremely dubious that deviations of 83% and 95%, such as those produced by the votes cast formula, could ever be justified without compromising the underlying constitutional principle articulated in *Reynolds* v. *Sims, supra*.

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[11]See *WMCA, Inc.* v. *Lomenzo, supra*; *Maryland Committee for Fair Representation* v. *Tawes*, 377 U.S. 656 (1964); *Davis* v. *Mann*, 377 U.S. 678 (1964); *Roman* v. *Sincock*, 377 U.S. 695 (1964); *Lucas* v. *Colorado General Assembly*, 377 U.S. 713 (1964).

Moreover, the record in this case demonstrates clearly that the votes cast formula is not designed to accomplish effectively the State's purpose. The policy pursued by the State, *i.e.*, exclusion from the apportionment base of certain groups of persons ineligible to vote, is not itself improper.[12] But the formula was not shown to bear any relationship to effectuation of that policy. Three expert witnesses testified that the formula is not an accurate predictor of voting age population or of any other permissible subgroup of population (Tr. 55-56, 202, 1085-1086).

Rather than attempt to eliminate the ineligible voter population from its apportionment base through the use of a direct method, the State devised a unique formula that artificially attempts to "distribute the ineligibles over the entire county" (J.S. 4). By using votes cast as its method of distribution, the formula also excludes eligible voters who for whatever reason failed to vote in the last general election. Also excluded by the formula are persons who voted by absentee ballot.[13] Furthermore, the formula was used only in those counties that were split between legislative districts. Accordingly, the six counties that did not require splitting were apportioned on the basis of actual census population, in utter disregard of appellants' asserted purpose in using the formula. Finally, it was shown that in New

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[12]In addition to those ineligible to vote because of age, conviction of a crime, or other legal disability, appellants sought to eliminate from the apportionment base persons "who either through their personal disinclination [or] some sort of disability, do not participate in [the State's] political process" (Tr. 792). Such a criterion obviously lends itself to the sorts of problems recognized by this Court in *Burns* v. *Richardson*, *supra*, as inherent in the use of voter registration figures. See note 10, *supra*.

[13]While the State asserted that absentee ballots were ignored because they were distributed fairly evenly throughout the State, it was shown at trial that some counties had absentee ballot rates of less than two percent while others had rates in excess of ten percent (Tr. 780-783).

Mexico a "disproportionate percentage" of people do not vote in the precinct in which they live, but instead return to the place where they grew up to cast their ballots (Tr. 718). Thus, "total votes cast" in a precinct or county may bear little relationship to the number of persons living in an area.[14]

In light of the severe malapportionment based on total population caused by the votes cast formula and the absence of a substantial state interest that is furthered by employing this formula, the district court was clearly correct in concluding that the votes cast formula does not fulfill appellants' obligation to make a "good faith effort to construct * * * [legislative districts] as nearly of equal population as is practicable" (*Reynolds* v. *Sims, supra*, 377 U.S. at 577).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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AUGUST 1982

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[14]Even the Director of Legislative Counsel Services for the State testified that the figures produced by the formula were wholly artificial (Tr. 788-791). He stated that the figure was called "estimated population simply because [they] didn't know what else to call it. One hardly passed a bill saying phony population" (Tr. 710).

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No. 81-2385

IN THE

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BRUCE KING, Governor of the State of New Mexico and SHIRLEY HOOPER, Secretary of State of the State of New Mexico,

Appellants,

v.

FRANK I. SANCHEZ, *et al.*, RAYMOND VARGAS, *et al.*, D. H. "CHILI" YAZZIE, *et al.*, RONALD G. OLGUIN, *et al.*, and PATRICIA M. MARSH,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

APPELLANTS' BRIEF IN OPPOSITION TO THE VARIOUS MOTIONS TO AFFIRM

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No. 81-2385

IN THE

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Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

APPELLANTS' BRIEF IN OPPOSITION TO THE VARIOUS MOTIONS TO AFFIRM

Pursuant to Sup. Ct. R. 16.5, Appellants respectfully submit this single response to the three motions to affirm filed by the Vargas Appelles, the Sanchez Appellees and the United States, respectively.

ARGUMENT

Appellees in their respective motions miscast the ruling of the court below and as a result paint an erroneous picture of the issue presented for review by this Court. Appellants are therefore compelled to take this opportunity to: (1) correct

Appellees' mischaracterization of the district court's opinion;[1] (2) demonstrate the fallacy of Appellees' arguments concerning the issue presented by the record below; and (3) properly frame the issue raised by this case for review by this Court. The preeminent issue before the Court is whether the district court erred in holding that state legislative apportionment must be based exclusively on raw population figures. The district court totally failed to consider whether New Mexico could use a population base other than one based solely on census population or whether the votes-cast method adopted by the State established a constitutionally permissible population base. Appellees' attempt to frame the issue on appeal as something other than this and their selected attack on supposed "deficiencies" in the record is nothing more than a smoke screen to obstruct the resolution of this key issue.

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[1] Appellees incorrectly state that the lower court ruling left to the New Mexico State Legislature "both the method *and data* to be used in reapportionment," Vargas Motion at 7 (emphasis supplied). The lower court clearly left to the Legislature "the method to employ in again attempting reapportionment," J.S. App. at B-3 to B-4, but just as clearly the district court required the legislature to construct districts based on data which reflects "actual population," J.S. App. at B-4.

Appellees also suggest that because the lower court made reference to the ability of the State to correct census data errors, the court somehow sanctioned the use of other than a total population base. Vargas Motion at 7-8. However, a reading of the relevant paragraph in context demonstrates that the "obvious errors" mentioned by the court referred only to errors in counting the total population or errors in the translation of total population data from census enumeration districts and blocks to noncoterminous precincts. *See* J.S. App. at B-3.

Finally, Appellees suggest that the lower court made a series of critical "findings" which somehow preclude review of the issue raised by Appellants. *See* Vargas Motion at 8, Sanchez Motion at 5-6. As will be discussed below, the fact is that the district court made no such findings, and did not hold as Appellees argue, that the standard set out in *Burns* v. *Richardson*, 384 U.S. 73, 94-95 (1966) had not been met in this case. The only holding of the lower court was that legislative districts in New Mexico must be constructed "on the basis of actual population," J.S. App. at B-4.

I. THE DISTRICT COURT INCORRECTLY VIEWED THE POPULATION-BASE ISSUE AS BEING LINKED WITH DEVIATIONS AMONG DISTRICTS FROM RAW POPULATION FIGURES AND FAILED TO CONSIDER WHETHER NEW MEXICO HAD ESTABLISHED A CONSTITUTIONALLY PERMISSIBLE POPULATION BASE THROUGH USE OF THE VOTES-CAST FORMULA.

Contrary to Appellees' contentions, the district court held that the legislature of New Mexico must construct districts based on data which reflects "actual population," J.S. App. at B-4. A reading of the opinion of the district court demonstrates that the court rejected *per se* New Mexico's effort to counteract the effects of the existence of ineligibles in its population. That opinion fails to discuss at all the legitimacy of a state attempting to utilize a population base other than one based solely on raw population. The holding of the district court was that New Mexico *must* apportion its districts exclusively on the basis of raw population figures. It is clear that the district court *never* considered whether there existed another permissible population base by which the State could apportion. Therefore, the lower court's discussion concerning deviations "from the population ideal," J.S. App. at B-2, is irrelevant, and Appellees' mischaracterize the threshold issue before the Court in this case by basing their arguments on these supposed deviations.

Burns v. *Richardson*, 384 U.S. 73 (1966), indicates that an apportionment plan which derives from a base other than actual population must be judged by whether it approximates the base, *not* whether it approximates an *actual population base*. *Burns* thus permits the use of an alternative population base and, therefore, the deviation percentages cited by the district court in its opinion and Appellees in their briefs are inapplicable until the question of what that base can be is resolved.[3] Deviations from actual population have no place in

[3] Indeed, it is not in dispute that if New Mexico's method of deriving the relevant population base is constitutionally permissible, then the numerical deviation present among legislative districts is not more than 5% in any case. J.S. at 4.

the calculation *if* actual population is not the base being utilized. The district court never reached that issue because it held that actual population is the only base which may be used. The approach taken by Appellees merely restates their position that apportionment may only be carried out on the basis of actual population, a position that was accepted in its entirety by the district court.

The mere recitation of the *Burns* standard in the district court's preliminary statement of the applicable law, J.S. App. at B-2, hardly qualifies as a holding that the *Burns* circumstances have not been established in this case as Appellees argue. *See* Vargas Motion at 9. There is no other discussion of *Burns* or the factors present in that case to be found in the lower court's opinion. Appellees' attempt to turn this language into "findings" which they assert formed the basis upon which the district court rejected the applicability of *Burns* to the present case is nothing more than sheer sophistry. *See* Vargas Motion at 8, Sanchez Motion at 5-6. The issue clearly joined is whether New Mexico is foreclosed *per se* from apportioning on a population base other than one exclusively based on raw population figures, and if it is not, whether the votes-cast formula adopted by New Mexico is constitutionally permissible on the basis of this "other" base.

When properly viewed in this way, Appellees' argument concerning the maximum deviation constitutionally permissible "from population equality" evaporates. Appellees first argue that the Court must first look to actual or raw population (all people who reside in an area irrespective of age, eligibility to vote, citizenship, etc.) to see if the deviations from this population among districts under the New Mexico plan are excessive. Vargas Motion at 12-15, Sanchez Motion at 5-6, Government's Motion at 7, 9. They then argue that if the deviations from an "actual population base" are inordinate the State may not use that plan, even if the population base under the plan is not "actual population." *Id.* What Appellees and the court below both ignore is that neither the reasoning of *Burns* nor any of the other cases that have dealt with this issue dictates such an approach. In the language of *Burns* "[i]t is enough if it appears

that the distribution of registered voters (or whatever other base is chosen) approximates distribution of state citizens *or another permissible population base*." 384 U.S. at 95 (emphasis supplied).[3] *Burns* does not state that the "actual population base" is the *only* "permissible population base."

In *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), the Court clearly and unequivocally,[4] rejected the notion that raw census

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[3] Appellees also seek to elevate this Court's remarks in *Burns* about a voter or registered voter base into some kind of a constitutional precondition to the use of any base other than actual population. Vargas Motion at 20; Sanchez Motion at 6. However, that dicta from *Burns* establishes no such precondition and none of those concerns expressed by the *Burns* Court are present here. First, as previously pointed out, the New Mexico formula is not purely voter based—it is rather a meld of population and voter bases. J.S. at 12-14.

Second, contrary to Appellees' contention, the formula does not "perpetuate underrepresentation of groups constitutionally entitled to participate in the process." *Burns*, 384 U.S. at 92. The thrust of this concern relates to the imposition of a voter or registered voter basis on a system which systematically precludes groups from participation in the political process. *See e.g., Yelverton v. Driggers*, 370 F. Supp. 612 (M.D. Ala. 1974) (where voter registration is disproportional due to history of racial discrimination, use of voter registration data leads to impermissible dilution). The evidence before the district court clearly established that the groups raising the claim here have had every opportunity to register and vote and thus, there can be no claim that they are precluded from doing so. *See Martin* v. *Venables*, 401 F. Supp. 611, 617 (D. Conn. 1975). Indeed, the evidence establishes that the State through the Secretary of State's Office has and continues to affirmatively aid and encourage minority registration and voting.

[4] The Government impliedly concedes that the *Gaffney* Court's concern with raw population is relevant here, but suggests that Appellants take that discussion out of context. Government's Motion at 7, n. 9. Appellants, however, have never contended that this case is factually similar to *Gaffney*. *Gaffney* was a garden variety numerical deviation case in which this Court reversed a lower court order invalidating the Connecticut legislative apportionment scheme. The Court held in effect that the 7.83% maximum deviation among districts was de minimis and, therefore, did not make out a prima facie case. Unlike this case, in *Gaffney* there appears to have been no dispute about the proper population base. The point Appellants wish to make is that the important discussion in *Gaffney*, which may

data should ever rise to the level of a constitutional imperative as suggested by Appellees and, in fact, indicated the pitfalls of such reliance. *Id.* at 749.[5] This case provides a further opportunity for the Court to supply some needed direction to New Mexico and other states attempting to grapple with "special population" problems.

II. THE QUESTION PRESENTED BY APPELLANTS IS PROPERLY FRAMED FOR RESOLUTION ON THE MERITS AFTER PLENARY REVIEW.

Appellees refer to an incomplete segment of one witness's testimony and to supposed gaps in the record, and on that basis contend that the factual record in this case does not provide the vehicle for the resolution of the issues previously outlined by Appellants.[6] In fact, the record including Mr. Buchanan's testimony, is replete with material relevant to a full and fair resolution of this case on appeal. Among that material is evidence concerning the presence and location of large military installations in New Mexico, (Tr. 704-5); the size and location of correctional institutions and hospitals, (Tr. 704, Exhibits T, U); and the presence of large institutions of higher learning (Tr. 704, Exhibits U, ZZ). The record also contains a description of the illegal alien problem faced by New Mexico,

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have been helpful to the numerical deviation issue presented there, is even more significant in the context of the present case. J.S. at 8-9 and 11-13. It is after all this case which squarely raises the issues to which the *Gaffney* discussion most appropriately applies, *i.e.*, the permissible range of choices available to a state in the selection of the relevant population to which the fourteenth amendment deviation analysis ought be applied.

[5] Appellees own expert conceded that "if you were trying to equalize the number of people registered or number voting, the formula would have that effect." (Tr. 200).

[6] The entirety of Mr. Buchanan's testimony (Tr. 688-841) fully supports Appellants' position before this Court and clearly demonstrates that reliance on a selected portion of testimony taken out of context can sometimes be misleading. For example, Appendix A *infra* contains the testimony of Mr. Buchanan which immediately followed that quoted at length by Appellees.

as well as an estimate of numbers and the location of their concentrations throughout the State. (Tr. 550-52, 707, Exhibit AAA, 1029). This case therefore squarely presents for resolution by this Court the question of whether a base other than actual population may be used for reapportionment purposes and the corollary question of whether the "special population" problems faced by New Mexico are such that the population-based, votes-cast formulaic approach is a constitutionally permissible option under the fourteenth amendment.[7]

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court deny the motions for summary affirmance, note probable jurisdiction, and set this matter for plenary consideration on the merits.

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[7] Appellees also argue that the formula is "not uniformly applied throughout New Mexico," because some of New Mexico's legislative districts comprise only whole counties and others do not. Vargas Motion at 3, n. 3. The formula is uniformly applied throughout the State, and in its application to districts which are comprised of whole counties directly ties back to the county-wide census data. This focus on raw census population data demonstrates that the formula is not solely votes-cast as Appellees would characterize it, but rather is significantly attached to county-wide total census population, thus properly balancing both "population" and "votes." *See* J.S. at 12-14.

Respectfully submitted,

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APPENDIX A

TESTIMONY OF CLAY BUCHANAN
Tr. 792–98

Q. (Mr. Goldberg, continuing.) Does it [votes cast] seek to identify registered voters and estimate who are the registered voters and how many live in that precinct?

A. No.

Q. Does it seek to identify an estimate of people who are eighteen and over?

A. No, it does not.

Q. And does it seek to estimate and identify people who go into the polling booths and cast ballots?

A. No.

Q. Does it seek to estimate–identify and estimate people who are qualified to vote, but may or may not register to vote?

A. No.

Q. Does it seek to identify and estimate any other identifiable group of population within that precinct, that you can think of?

A. No, I think it seeks to eliminate.

Q. Okay. Would you describe for me, who it seeks to eliminate, Mr. Buchanan?

A. It seeks to eliminate the large groups unidentifiable for subtraction, unidentifiable, who either through their personal disinclination or some sort of disability, do not participate in our political process.

Q. Would you define for me—or rather, would you describe for the Court, what you mean by "do not participate in our political process"?

A. All of the people who have legal disqualifications, people who have religious scruples against voting, people who simply do not choose to vote, who do not want to vote.

Q. Why wouldn't—then, just counting the people that go into the voting booth and cast ballots, why wouldn't that do the job for you, Mr. Buchanan?

A. The formula brings in the raw population count and makes it a part of this artificial figure. In other words, this is not using raw census counts, which includes all the ineligibles, except that it provides for the total for the county. The theory of the formula, as it has changed, in my mind, over the years, is that it is a rough unscientific figure, political version of how to arrive at the concept of one-man, one-vote.

Q. But if the purpose of the formula, Mr. Buchanan, is to exclude people who do not choose to participate in the political process, these people would have legal disabilities, under eighteen, felons, aliens, or otherwise legally disqualified, people who have religious or moral—groups of people who are just too lazy to get out and vote, why do we need some formula approach at all? Why don't we just base our reapportionment exclusively on totaling up the number of people in the state who cast their ballots, dividing them by seventy, to make the ideal district and determine the precincts by who goes into the voting booths, and ballots?

A. Originally, the formula was written in the law because it was the Legislative Council's staff's suggestion—concept that the court had suggested that we use the population statistics where we had them, and the lowest we had was the county, and that where we didn't have population statistics from the census bureau to fit our precincts, that we use votes cast for governor in the last general election, and so we were attempting to—since the apportionment had to go back to the judge or court, we thought, we attempted to give him what he asked for.

Q. That's always a prudent course of action?

A. The—we are now talking about twenty years later. There are a great number of things that have been written about one-man, one-vote. I have thought a great deal about it. We spent most of our time in the early Sixties doing this, and while it did not start out with any scientific intent to arrive at some perfect thing, it was a way to achieve it. The point was that—

Q. Excuse me, Mr. Buchanan, I will let you finish, but what do you mean by "it"?

A. Achieve an apportionment for the New Mexico Legislature that followed the concept of one-man, one-vote.

Q. Do I understand—I'm sorry, I don't want to interrupt you.

A. Well, earlier on, you asked me some questions—I was asked questions, I don't know who asked them, about my expectations of the census bureau. And I think maybe it was on direct.

Q. Yes, I think it was Mr. Kelly. I haven't gotten to that, yet.

A. Anyway, the fact that it was an—expedient when we did it, nobody thought about what we were doing and so forth, then as the concept developed and we wonder what it is we are talking about, then the formula begins to appeal to you in a sense that this is a tool for the legislature to do it, to do an apportionment that will have the voter equivalency, the vote concept, of equality and the population concept of equality melted.

We haven't asked anybody to do a model of it, or anything like that, but it appealed to a theory that the population was important, that the politics was important and voting was important, and it was a way to give to the legislature to do it, a method.

Q. And you adhere to the view that population is important in reapportioning the legislature?

A. The population is not the criteria for the state legislature that it is for congress, for example.

Q. Let's look at congress, is population an important element of the data base for reapportioning the United States Congress, redistricting the United States Congress in the State of New Mexico?

A. Yes.

Q. Is the congressional redistricting done on the basis of total population?

A. Yes.

Q. Is population an important element of redistricting the state legislature in New Mexico?

A. Not raw population.

Q. What do you mean—what do you mean by "raw population"?

A. Well, raw population is those figures published by the census that do not teli us a great deal about the population. It doesn't tell us when you look at a number in the census, that this person is an alien, convicted felon, who has been certified to be insane, that's a resident of Michigan and votes absentee, that he—what he is doing here. All we know is that the census bureau has counted a warm body.

Q. But by "raw population," then, you are really talking about the raw census figures?

A. Yes.

Q. The raw modifies the census figures. Is any element—without reference to who is doing the counting and how valid

the counting may be, just looking to people out there, is population an important part of determining—the data base for building a reapportionment?

A. It is in some states. In New Mexico, I don't think it's as important as other issues.

Q. Okay. So it's certainly not in your top priority in New Mexico?

A. No.

Q. And the votes-cast formula does not make population a top priority for reapportionment of the state legislature, in New Mexico, does it?

A. Yes. It is a composite figure, total populations, if that's what you mean, are used to create single-member districts. They are sometimes used as a unit solely within another legislative district. I'm not trying to discount population. I'm saying that raw population, without telling what they do, is not apportioned part of one-man, one-vote.

Q. Again, without reference to whose—whether you are using the census figure or using early census figures or late, or whether they are being adjusted or whatever, is population—a count of population an important part of reapportionment in New Mexico?

A. Yes.

MR. KELLY: If the Court please, I—I believe that question has been asked and answered at least twice.

JUDGE SETH: It's been asked several times and answered several times. I think we have pretty well covered the subject, counsel.

Q. (Mr. Goldberg, continuing.) You stated, Mr. Buchanan, that your views of the votes-cast formula has changed over the years, is that correct?

A. Yes.

Q. In the estimate of the Legislative Council Service, has the votes-cast formula ever been intended to estimate population?

A. By "population" you mean numbers. It has never been intended to estimate numbers of warm bodies.